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Title: Key Tronic Corporation, Petitioner
v.
United States, et al.
and
Stanton Road Associates, Petitioner Lohrey Enterprises, Inc., et al.

Court: United States Court of Appeals for the Ninth Circuit

Counsel for petitioner: Moore,James R.

Counsel for respondent: Solicitor General, Bunzel,Robert H.

NOTE: Due 090593-SUN 090693-HOL *Stanton Road Associates v. Lohrey Enterprises, Inc., et al., 91-15729, 012893, reh. den. 060793-USCAN

Entry	Date	Note	Proceedings and Orders
1	Sep 7 1993	G	Petition for writ of certiorari filed.
2	Sep 29 1993		Brief amicus curiae of Gloria Price filed.
3	Sep 30 1993		Brief of respondents Lohrey Enterprises, Inc., et al. in opposition filed.
5	Oct 5 1993		Order extending time to file response to petition until November 8, 1993.
6	Oct 25 1993		Supplemental brief of petitioner filed.
7	Nov 8 1993		Brief of Federal respondents filed.
8	Nov 17 1993		DISTRIBUTED. December 3, 1993 (Page 1)
10	Dec 6 1993		REDISTRIBUTED. December 10, 1993 (Page 11)
11	Dec 13 1993		Petition GRANTED.
			**********
12	Dec 16 1993		Writ of certiorari as to Stanton Road Associates v. Lohrey Enterprises, Inc., et al. dismissed pursuant to Rule 46.1.
13	Jan 26 1994		Joint appendix filed.
14	Jan 26 1994		Brief of petitioner Key Tronic Corporation filed.
15	Jan 27 1994		Brief amicus curiae of Atlantic Richfield Company filed.
16	Feb 2 1994		SET FOR ARGUMENT TUESDAY, MARCH 29, 1994. (3RD CASE).
17	Feb 14 1994		Record filed.
		*	Original record proceedings United States District Court for the Eastern District of Washington (Box)
18	Feb 16 1994		Record filed.
		*	Partial proceedings United States Court of Appeals for the Ninth Circuit.
19	Feb 25 1994		CIRCULATED.
20	Feb 28 1994	X	Brief amicus curiae of Sand Springs Superfund PRP Group filed.
24	Feb 28 1994		Order extending time to file brief of respondent on the merits until March 2, 1994.
22	Mar 1 1994		Brief of respondent United States filed.

93-376

No._____

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In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,

Petitioner,

v.

UNITED STATES ET AL.,

Respondents.

STANTON ROAD ASSOCIATES,

Petitioner,

v.

LOHREY ENTERPRISES, INC., ELECTRONIC VALET SYSTEMS, INC., DAVID LOHREY AND NATHAN PANG,

Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James R. Moore
(Counsel of Record)
Mark W. Schneider
Kathryn L. Tucker
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888

Steven L. Hock
James C. Collins
Bruce J. Berrol
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
(415) 392-6320

Attorneys for Petitioners

82 pp

QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred (a) to prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) to search for and identify other parties responsible for the contamination; and (c) to litigate cost recovery actions against other responsible parties to compel their participation in the remediation.

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D. Opinion of the United States District Court for the Northern District of California in *Stanton Road Assoc. v. Lohrey*

E. Order of the United States Court of Appeals for the Ninth Circuit Denying Rehearing and Rehearing En Banc in *Key Tronic Corporation v. United States*

F. Order of the United States Court of Appeals for the Ninth Circuit Denying rehearing and rehearing en banc in *Stanton Road Assocs. v. Lohrey Enters.*

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In the

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October Term, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES ET AL.,
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STANTON ROAD ASSOCIATES,
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v.

LOHREY ENTERPRISES, INC., ELECTRONIC VALET SYSTEMS, INC., DAVID LOHREY AND NATHAN PANG,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Key Tronic Corporation[1] and Stanton Road Associates[2] respectfully jointly petition for a writ of certiorari to

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[1]Key Tronic Corporation has no parent company. All of its subsidiaries are wholly owned. Sup. Ct. R. 29.1.

[2]Stanton Road Asociates has no parent company and no subsidiaries. Sup. Ct. R. 29.1.

review the judgments of the United States Court of Appeals for the Ninth Circuit in *Key Tronic Corporation v. United States et al.*[3] and in *Stanton Road Associates v. Lohrey Enterprises et al.*

OPINIONS BELOW

The opinion of the Ninth Circuit in *Key Tronic Corporation v. United States* is reported at 984 F.2d 1025 and is reprinted in Appendix A. The opinion of the district court is reported at 766 F. Supp. 865 and is reprinted in Appendix B.[4] The opinion of the Ninth Circuit in *Stanton Road Assocs. v. Lohrey Enters.* is reported at 984 F.2d 1015 and is reprinted in Appendix C. The opinion of the district court is reported at 1991 U.S. Dist. LEXIS 5630 and is reprinted in Appendix D.

JURISDICTION

The judgments of the Ninth Circuit in both cases were entered on January 28, 1993. On June 7, 1993 the Court denied timely petitions for rehearing (by 2-1 votes) and also denied suggestions for rehearing en banc. Appendices E and F. This Court has jurisdiction to review the decisions by the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*, also known as Superfund, provides that private and governmental plaintiffs may recover "necessary costs of response" or "costs of removal or remedial action." 42 U.S.C. § 9607(a)(4)(A), (B).

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[3]The Respondents are the United States of America, the United States Air Force, and Donald B. Rice, the Secretary of the United States Air Force, in his official capacity. Sup. Ct. R. 14.1(b).

[4]The district courts were vested with jurisdiction by 42 U.S.C. §§ 9607(a) and 9613(b). Sup. Ct. R. 14.1(i).

"Response" is defined in CERCLA § 101 to mean "remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).

STATEMENTS

A. KEY TRONIC CORPORATION'S STATEMENT OF FACTS

This case involves the recovery of costs incurred by Petitioner Key Tronic Corporation ("Key Tronic"). Key Tronic voluntarily performed environmental cleanup measures in a timely manner to protect public health and was then forced, by the recalcitrance of others with similar legal responsibility for the environmental contamination, to investigate and pursue legal remedies against those recalcitrant parties.

Key Tronic acted on its own initiative to protect citizens from exposure to contamination leaching from the Colbert Landfill in Eastern Washington ("Colbert" or "Landfill"). When the contamination was discovered, Key Tronic publicly disclosed its prior use of Colbert and took immediate steps to correct the problem. In contrast, Respondent United States Air Force ("Air Force") had comparable responsibility for the problem, but did not acknowledge its use of Colbert or its contribution to contamination. The Air Force took no action until pursued by Key Tronic. Eight years after Key Tronic responded, the Air Force finally agreed to pay a portion of the costs for the long-term cleanup, pursuant to a remediation plan that Key Tronic previously designed and partially funded.[5]

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[5]The Air Force agreement with the United States Environmental Protection Agency ("EPA") was finalized more than one year after Key Tronic had settled with EPA, and only after the Air Force was adjudged liable to Key Tronic for costs associated with Colbert as a result of Key Tronic's state law contribution action. The Air Force was held liable to Key Tronic in the contribution case on

Key Tronic incurred costs to investigate well contamination and to provide neighboring residents with alternative water supplies.[6] Key Tronic incurred costs in searching for other responsible parties to establish their contribution to the contamination problem. It incurred costs in preparing the remediation plan and Consent Decree, which established the cleanup action to be taken. Finally, it incurred costs in litigating this cost recovery action to require the Air Force and other PRPs to reimburse it for a portion of these costs.[7]

Spokane County ("County") operated the Landfill in Eastern Washington during the 1970s. Appendix B, at 2. During that decade, liquid chemicals were disposed of at the Landfill by a number of entities, including Key Tronic and the Air Force. Appendix A, at 2.

In the fall of 1980, the Washington Department of Ecology ("WDOE") tested drinking water wells in the area surrounding the Landfill and determined that 1,1,1-trichloroethane ("TCA") was present in higher than acceptable quantities. Appendix A, at 2. Appendix B, at 2. WDOE advised residents adjacent to the landfill not to use their well water.

Key Tronic and the County responded promptly to the public health threat posed to neighboring residents, jointly retaining consultants to further evaluate conditions at the Landfill. Extensive well water sampling and analyses were performed in 1982. Beginning in 1983, Key Tronic supplied bottled water to residents adjacent to the landfill and funded installation of a new water system.

November 3, 1989. The Interagency Agreement was finalized on some unspecified date after February 4, 1990.

[6]Those costs, totalling $696,268.06, were not at issue in the Ninth Circuit.

[7]Key Tronic also agreed to pay $4.2 million to fund the long-term cleanup at Colbert. Appendix A, at 2. It dropped its action to compel the Air Force to reimburse it for those costs because the Air Force subsequently agreed to contribute $1.45 million to that effort.

Key Tronic undertook the necessary investigation to identify other potentially responsible parties ("PRPs"), one of which was determined to be the Air Force, for the purpose of assuring that they would participate in the ultimate long-term remedial effort and share costs (the "PRP search"). Key Tronic's efforts in identifying responsible parties and establishing the Air Force's disposal of wastes at Colbert resulted in the EPA's action against the Air Force. Appendix B, at 14, n.4.

Key Tronic also retained counsel and a consultant to work with EPA and WDOE to investigate the site, develop a remedy and draft the scope of work and Consent Decree which established the remediation to be performed at the Landfill. The technical and legal work performed by Key Tronic resulted in agreement with EPA on reasonable and appropriate remedial action.[8]

Key Tronic incurred costs responding to hazards at the Landfill in two different ways. First, it incurred remediation costs on its own initiative before entering the Consent Decree ("pre-Consent Decree costs") and, second, it agreed to pay money pursuant to the Consent Decree ("Consent Decree costs") for further response action. The appeal below concerned only Key Tronic's voluntarily incurred pre-Consent Decree costs, and related enforcement costs. It did not concern Consent Decree costs.

1. Decisions Below

Key Tronic filed the complaint in this cost-recovery action in October 1989. The action named three defendants, including the Air Force.[9] The action asserted both a private cost recovery claim under

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[8]In August 1983, Colbert was designated by EPA as a National Priorities List site under CERCLA § 105. EPA issued its Record of Decision for the Landfill in September 1987.

[9]Key Tronic reached settlement with one of the defendants, Alumax, prior to argument of Key Tronic's motion for summary judgment. Appendix B, at 4. Key Tronic's claim against the other defendant, the Landfill operator, was dismissed

CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), and a contribution claim under CERCLA § 113(f), 42 U.S.C. § 9613(f). The Air Force moved to dismiss both claims against it. The Air Force argued, based on the fact that it had entered into an Interagency Agreement with EPA and WDOE regarding cleanup of Colbert, that it was entitled to contribution protection, under CERCLA § 113(f)(2).

Because the Air Force had executed the Interagency Agreement, Key Tronic acquiesced in the dismissal of its Section 113 contribution claim (i.e., claims for recovery of consent decree costs), and the district court granted summary judgment to Key Tronic on its Section 107 cost recovery claim (i.e., pre-consent decree costs and all enforcement activity costs, including attorneys' fees). Appendix B.

The Air Force and Key Tronic subsequently negotiated the amounts to be paid on all six categories of claimed response costs in a two-step process. First, the parties executed a Consent Decree providing for payment on two categories of costs (well contamination investigation and provision of alternative water supplies) and reserved the other four categories of costs (the "excepted claims") which the Air Force intended to appeal.[10] Second, the parties entered a stipulation regarding the amounts the Air Force would pay on the excepted claims, so that a final judgment could be entered. Appendix A, at 3.

On the Air Force's appeal of the excepted claims, the Ninth Circuit reversed and held that CERCLA does not authorize the

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based on a covenant not to sue that Key Tronic had given the County in the Consent Decree, which extended to county employees, including the Landfill operator. Appendix B, at 3.

[10]The excepted claims included attorneys' fees incurred in negotiating the Consent Decree and scope of work, fees incurred in the PRP search, fees incurred in bringing the cost recovery action, and prejudgment interest on excepted claims. The Air Force did not pursue appeal of the interest claim.

recovery of attorneys fees. Thus the court held that the district court had no authority to award fees in any of the three categories of fees incurred by Key Tronic.

B. STANTON ROAD ASSOCIATES' STATEMENT OF FACTS

This case involves a completely innocent private landowner enforcing the clean-up provisions of CERCLA against a recalcitrant polluter. Petitioner Stanton Road Associates ("Stanton Road") owned a large commercial warehouse office building on property in Burlingame, California. Appendix D, at 2. Respondents owned and operated an industrial dry-cleaning plant on property contiguous to Stanton Road. Appendix D, at 2-3.

For several years through 1988, respondents repeatedly contaminated Stanton Road's property by allowing the hazardous chemical perchloroethene ("PCE") to spill from the dry-cleaning plant onto and beneath Stanton Road's property. Appendix D, at 5-6. Respondents also dumped sludge containing PCE from the dry-cleaning operations onto property leading to Stanton Road's property. Appendix D, at 6.

Upon learning of the contamination in 1988, Stanton Road repeatedly asked respondents to investigate and clean up the contamination. Respondents did not do so. Appendix D, at 6.

In this same time frame, government authorities issued to respondents citations and demands for remediation of the PCE pollution. Respondents did not do so. Appendix D, at 6-7.

For nearly three years respondents ignored every effort by Stanton Road and the government to get them to clean up the contamination they had created. Stanton Road was forced to hire an environmental consultant to deal with the pollution problem, and to pursue litigation as the only available means of forcing respondents to comply with their obligations under state and federal law. Consequently, Stanton Road incurred attorneys fees and costs in

responding to the contamination caused by respondents. Appendix D, at 9.

1. Decisions Below

On March 15, 1989 Stanton Road filed this action in the United States District Court for the Northern District of California pursuant to sections 107 and 113 of CERCLA and pursuant to various state laws. The District Court ruled in favor of Stanton Road on every contested issue. The Court found that respondents were completely responsible for the contamination of Stanton Road's property and that they refused to clean up the property even after both Stanton Road and government officials demanded cleanup. Appendix D, at 6-7.

The Court ordered, *inter alia*, pursuant to CERCLA that respondents pay all response costs incurred up to that point by Stanton Road, including attorneys' fees (allocated so that only the portion under CERCLA was awarded). The district court awarded $126,197.78 in attorneys' fees as one component of Stanton Road's reasonable "response costs" incurred in investigating and successfully prosecuting its CERCLA claims against respondents. Appendix D, at 10-11. The court also granted Stanton Road declaratory relief for all future costs of response. Appendix D, at 11.

On appeal the Ninth Circuit reversed the award of attorneys' fees, holding that any exception to the American Rule must be explicitly authorized by statute and that CERCLA does not contain an explicit authorization.

REASONS FOR GRANTING THE WRIT

A. THERE IS AN INTER-CIRCUIT CONFLICT INVOLVING FIVE CIRCUITS WHICH HAVE RULED ON THE ISSUE

Five circuit courts have ruled on whether CERCLA authorizes recovery of attorneys' fees as response costs in private cost recovery

actions. Two circuits hold that it does, two circuits hold that it does not, and one circuit holds that certain fees may be recoverable while others are not.[11]

1. The Sixth and Eighth Circuits Have Held That CERCLA Authorizes Recovery of Attorneys' Fees in Private Party Response Cost Actions. The Tenth Circuit Permitted Recovery of Certain Fees

The Eighth Circuit in *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S. Ct. 1390 (1991), upheld an award of attorneys' fees as CERCLA response costs.[12] In analyzing whether Congress provided for recovery of attorneys' fees by private cost-recovery litigants, the Eighth Circuit construed §§ 107(a)(4)(B) and 101(25) of CERCLA. Section 107(a)(4)(B) provides that private parties may recover "necessary costs of response." Section 101(25) defines "response" as "remove, removal, remedy, and remedial action . . . [including] enforcement activities related thereto." The Eighth Circuit construed the inclusion of "enforcement activities" in the definition of "response" as express provision for recovery of attorneys' fees:

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[11] At present, petitioners are aware that district court decisions have recently been entered in at least three circuits that have not yet resolved the question, the Third, Fourth and Seventh Circuits. *Keystone Chem. Co. v. Mayer Pollock Steel Corp.*, 1993 U.S. Dist. LEXIS 3733 (E.D. Pa., March 10, 1993) (fees not recoverable); *HRW Sys. Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993) (fees recoverable); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281 (E.D. Va. 1993) (fees recoverable); *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, 1993 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993) (magistrate's report and recommendation) (fees recoverable). These circuits will likely soon have to address the issue presented by this petition.

[12] The Third Circuit previously awarded attorneys' fees in the prosecution of a private CERCLA action, but that decision was not published in the federal reporter. *Jersey City Redevelopment Auth. v. PPG Indus., Inc.*, 17 Chem. Waste Litig. Rptr. 626, 636 (3d Cir. 1988).

> Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses.

920 F.2d at 1422.[13] This construction, Petitioners maintain, is the proper one.

The Sixth Circuit recently followed the reasoning of *General Electric*. *Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993), *reh'g, en banc, denied*, (6th Cir. June 15, 1993). In *Donahey*, the purchaser of a contaminated parcel sued the seller and a past lessee of the property after it discovered the contamination, seeking rescission of the sales contract and cost recovery under CERCLA for reimbursement of costs incurred in investigating the contamination and attempting to clean it up. The district court denied recovery of all response costs, including attorneys' fees. The Sixth Circuit reversed the trial court's denial of attorney's fees as response costs under CERCLA. The Sixth Circuit stated:

> [T]his court prefers to follow the reasoning of cases such as *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991), *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990), and *General Electric Co. v. Litton*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 111 S.

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[13]Two 1992 Eighth Circuit decisions have followed *General Electric*. *Gopher Oil Co. v. Union Oil Co. of California*, 955 F.2d 519 (8th Cir. 1992); *United States v. Mexico Feed & Seed Co.*, 980 F.2d 478 (8th Cir. 1992).

Ct. 1390 (1991). The *Bolin* opinion made the following persuasive statement:

> By providing parties with a federal cause of action for the recovery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. [Citations omitted]. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs. 759 F. Supp. at 710.

987 F.2d at 1256.

The Tenth Circuit recently followed the Eighth and Sixth Circuits, in part, holding that nonlitigation-related attorneys' are recoverable response costs. *FMC Corp. v. AERO Indus., Inc.*, 1993 U.S. App. LEXIS 17,074 (10th Cir. July 9, 1993). In *FMC Corp.*, a group of responsible parties that had cleaned up a contaminated site pursuant to an EPA order sued another responsible party that had not participated in the cleanup for a variety of response costs. These costs included the costs of conducting the removal action, nonlitigation removal-related attorneys' fees and costs, and litigation fees and costs in bringing the cost recovery action. The trial court held the defendant liable for response costs under CERCLA and allocated the defendant a 25% share of the total response costs, but excluded attorneys' fees.

On appeal, the Tenth Circuit affirmed the 25% allocation and affirmed the district court's denial, under the American Rule of recovery of attorneys' fees incurred in litigating the cost recovery action. *Id.* at p. 6. This portion of the holding thus conflicts with the Eighth and Sixth Circuits and, Petitioners maintain, is incorrect. The Tenth Circuit reached a different conclusion, however, with respect to nonlitigation attorneys' fees, which it held do not fall under the American Rule because they are not incurred in pursuing litigation. The Tenth Circuit concluded that recovery of such fees is not barred as a matter of law. "Rather, the issue is whether nonlitigation attorneys' fees are necessary response costs within the meaning of Section 9607(a)(4)(B)." *Id.* The court concluded that attorneys' fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA would constitute recoverable response costs if determined to be necessary. *Id.* Accordingly, the court remanded for the district court to determine whether these nonlitigation attorneys' fees were necessary and therefore recoverable response costs.[14]

2. The First and Ninth Circuits Have Held That CERCLA Does Not Authorize Recovery of Attorneys' Fees as Response Costs in Private Party Response Cost Actions. The Tenth Circuit Held That CERCLA Does Not Authorize Recovery of Litigation-Related Attorneys' Fees

In *Stanton Road*, the Ninth Circuit held: "we are persuaded that the words 'enforcement activities' as used in Section 101(25) do not explicitly authorize the payment of attorneys' fees." 984 F.2d at

[14]Under the holding of the Tenth Circuit, two of the three categories of response costs sought by Key Tronic--the PRP search costs and the scope of work and consent decree negotiation costs--would be recoverable if determined to be necessary.

1019. The Ninth Circuit rejected the Eighth Circuit's construction of CERCLA §§ 107(a)(4)(B) and 101(25), stating:

> Attorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel. . . . A holding that attorneys' fees are not explicitly authorized in a private response action does not "read them out" of section 9607(a)(4)(B), as suggested by the Eighth Circuit.

Stanton Road, 984 F.2d at 1020; *Key Tronic Corp. v. United States*, 984 F.2d at 1027. What the panel did not acknowledge is that CERCLA, in contrast to most if not all other federal statutes embodying a private right of action, specifically allows private litigants to recover their costs in enforcing the statute, costs that necessarily include attorneys' fees. This was recognized by Judge Canby in his cogent dissent in *Stanton Road*, 984 F.2d at 1023: "If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable."

The First Circuit also specifically rejected the Eighth Circuit's approach. *In re Hemingway Transport, Inc.*, 993 F.2d 915 (1st Cir. 1993) *petition for cert. filed*, 62 U.S.L.W. 3114 (U.S. Aug. 17, 1993) (No. 93-187). *Hemingway* involved a claim for CERCLA response costs against parties who had filed in bankruptcy. The bankruptcy court awarded the plaintiff $38,000 as response costs but disallowed $54,000 in attorneys' fees, holding that these were not recoverable response costs. The district court affirmed. On appeal, the First Circuit rejected the argument that the term "necessary costs of response" should be construed to encompass attorneys' fee awards, stating: "Absent an explicit statutory authorization, a party is not entitled to recover attorneys' fees simply because it prevailed in the litigation." 993 F.2d at 934. Plaintiff disputed that all $54,000 was incurred in the cost recovery litigation itself, asserting that the greater portion of fees was incurred to ensure that plaintiff's

response was in compliance with EPA's order compelling cleanup. The First Circuit held:

> We conclude that the present claim was waived. At trial, [plaintiff's] attorney fee billings were admitted in evidence. [Plaintiff] suggested no distinction between attorneys' fees incurred for litigative and administrative purposes. [Plaintiff's] failure to advance the present contention below deprived the bankruptcy court of an opportunity to consider it, thereby waiving the claim.

Id. at 935. *Hemingway* might have presented a case similar to *FMC Corp.*, *supra*, and to *Key Tronic*, where a portion of claimed attorneys' fees did not relate to the cost recovery litigation itself, but related to the implementation of the removal or remedial action. However, the First Circuit did not reach the question of whether nonlitigation-related fees should be treated differently than those incurred in prosecuting a cost recovery action.

The Tenth Circuit, in *FMC Corporation v. AERO Industries*, *supra*, held that litigation-related fees were not recoverable response costs based on the American Rule. 1993 U.S. App. LEXIS 17074 at p. 6.

B. THE QUESTIONS PRESENTED ARE OF NATIONAL IMPORTANCE

1. Protection of Human Health and the Environment Is at Stake

The questions presented in this case are of national importance. In passing the Superfund statute, Congress recognized the need to clean up the numerous heavily contaminated sites, created from decades of waste disposal practices that are no longer tolerated by

modern environmental laws. The task of promoting cleanup of the estimated 35,000 such sites[15] is beyond the resources of EPA, the responsible enforcement agency. *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 21-22 (1989). The only possible means of promoting cleanup of these tens of thousands of polluted sites is through cleanup actions initiated by private parties. *Id. See also* Knopf, *Breaking New Ground: Recovery of Transaction Costs in Private CERCLA Cost-Recovery Actions*, 28 Willamette L. Rev. 495, 511 (1992).

Congress provided the mechanism to facilitate private-party cleanup in CERCLA § 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), by allowing private parties to undertake cleanup actions and then recover costs from the parties responsible for contributing to the contamination. The Ninth Circuit below construed "necessary costs of response" to exclude attorneys' fees despite the fact that such costs are necessarily incurred in responding to Superfund cleanups.

In so concluding, the Ninth, First and Tenth Circuits incorrectly construe the statute's language and frustrate Congressional intent. The Court should resolve the clear inter-circuit conflict on this important issue.

2. Prompt High Court Resolution of This Frequently Litigated Issue of Statutory Construction Is Essential to End Confusion Among Lower Courts

The many courts nationwide faced with the question presented in this case are divided in resolving the issue.[16] This Court's

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[15] As of August 1991, the federal government's database of contaminated sites, the Comprehensive Environmental Response, Compensation and Liability Information System ("CERCLIS"), listed 35,000 such sites. See 5 Superfund No. 17 (1991 Predicasts).

[16] Decisions from federal district courts in favor of allowing the recovery of attorneys' fees have come from district courts in Maryland, Michigan, Illinois,

guidance is needed to avoid the wasting of further judicial and private resources as federal district courts follow conflicting circuit court precedents. This confusion affects vast numbers of individuals and businesses, a large number of Superfund sites, and millions of dollars in remediation and related litigation costs. Moreover, with the present conflict, cost recovery litigants have incentive to forum shop for a forum that recognizes that fees are recoverable response costs.[17]

Virginia, Louisiana, Kansas, California, New York and Kentucky. *HRW Sys., Inc. v. Washington Gas Light Co.*, 823 F. Supp. 318 (D. Md. 1993); *Hastings Bldg. Prods., Inc. v. National Aluminum Corp.*, 815 F. Supp. 228 (W.D. Mich. 1993); *BTR Dunlop, Inc. v. Rockwell Int'l Corp.*, 1993 U.S. Dist. LEXIS 1720 (N.D. Ill. Feb. 12, 1993); *Chesapeake & Potomac Tel. Co. v. Peck Iron & Metal Co.*, 814 F. Supp. 1281 (E.D. Va. 1993); *Joy v. Louisiana Conference Ass'n of Seventh-Day Adventists*, 1992 WL 165670 (E.D. La. July 6, 1992); *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692 (D. Kan. 1991); *Pease & Curren Ref., Inc. v. Spectrolab Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472 (S.D.N.Y. 1990); *Lykins v. Westinghouse Elec. Corp.*, 27 Env't Rep. Cas. (BNA) 1590 (E.D. Ky. 1988). Federal district courts in Pennsylvania, Colorado, Oklahoma, New Hampshire, Rhode Island, and New Jersey have denied recovery of fees. *Keystone Chem. Co. v. Mayer Pollock Steel Corp.*, 1993 U.S. Dist. LEXIS 3733 (E.D. Pa. March 10, 1993); *AT&T Technologies, Inc. v. Heleva*, 1990 WL 76616 (E.D. Pa. June 6, 1990); *Fallowfield Dev. Corp. v. Strunk*, 1990 WL 52745 (E.D. Pa. Apr. 23, 1990); *Cook v. Rockwell Int'l Corp.*, 755 F. Supp. 1468 (D. Colo. 1991); *United States v. Hardage*, 750 F. Supp. 1444 (W.D. Okla. 1990); *Mesiti v. Microdot Inc.*, 739 F. Supp. 57 (D.N.H. 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145 (D.R.I. 1989); *T&E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696 (D.N.J. 1988); *BCW Assocs. Ltd. v. Occidental Chem. Corp.*, 1988 WL 102641 (E.D. Pa. Sept. 29, 1988).

[17]CERCLA permits cost recovery actions in either the "district in which the release or damages occurred, or in which the defendant resides, may be found, or has his principal office." 42 U.S.C. § 9613(b).

CONCLUSION

For the reasons stated, Petitioners respectfully request that the Court grant the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

RESPECTFULLY SUBMITTED this 3rd day of September 1993.

James R. Moore
(Counsel of Record)
Mark W. Schneider
Kathryn L. Tucker
PERKINS COIE
1201 Third Avenue
40th Floor
Seattle, WA 98101-3099
(206) 583-8888

Steven L. Hock
James C. Collins
Bruce J. Berrol
THELEN, MARRIN, JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
(415) 392-6320

Attorneys for Petitioners

APPENDIX A

KEY TRONIC CORPORATION, a Washington Corporation, Plaintiff-Appellee,

v.

UNITED STATES of America, United States Department of the Air Force; Donald B. Rice, Secretary of the United States Air Force, in his official capacity, Defendants-Appellants.

No. 91-36021.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 2, 1992.

Decided Jan. 28, 1993.

Before: SNEED, ALARCON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

The United States Air Force (Air Force) appeals from the award of $155,500 in attorneys' fees to Key Tronic Corporation (Key Tronic) in this private response cost recovery action. The district court held that the Air Force was liable to pay to Key Tronic attorneys' fees as necessary response costs for prosecuting this private response cost recovery action in the district court, for legal expenses incurred searching for other potentially responsible parties liable for the cleanup, as well as legal expenses incurred in the preparation and negotiation of a consent decree between Key Tronic and the United States Environmental Protection Agency (EPA). The Air Force contends that the district court erred in concluding that these legal expenses incurred by Key Tronic were necessary response costs compensable under section 107(a)(4)(B) of CERCLA. We agree and reverse the award of attorneys' fees.

I.

PERTINENT FACTS

The Air Force disposed of liquid chemicals at Colbert Disposal Site (Colbert) from 1975 to 1980. Key Tronic also disposed hazardous waste at Colbert. In 1980, the Washington Department of Ecology (DOE) tested the drinking water wells around Colbert and found that they were contaminated.

Key Tronic alleged that it incurred, at its own initiative, expenses totaling $1,271,511.10 in cleanup costs. Key Tronic subsequently entered into a consent decree with the EPA and DOE. The decree required Key Tronic to pay the EPA $4.2 million in response costs.

The Air Force also stipulated with the EPA and DOE to the entry of a consent decree. The Air Force agreed to pay the EPA $1.45 million for the clean up of Colbert. The EPA released the Air Force from any further liability, and granted the Air Force the "contribution protection" authorized by 42 U.S.C. § 9622(g)(5).[1] Pursuant to this section, the Air Force was freed from liability for contribution claims made by other parties regarding matters addressed in the settlement between the Air Force and the EPA. 42 U.S.C. § 9622(g)(5).

Key Tronic filed the present private response cost recovery action against the Air Force for 1) contribution for the $4.2 million it was obligated to pay under its consent decree with the EPA, and 2) an award of $1.2 million for response costs it incurred prior to its settlement with the EPA. Key Tronic contended that it incurred five different types of response costs: 1) remediation costs at the site prior to the EPA's involvement; 2) attorneys' fees expended trying

[1]Section 9622(g)(5) provides, in pertinent part: "[a] party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement."

to identify other potentially responsible parties (PRP's) liable for the clean up under CERCLA; 3) attorneys' fees for negotiating the scope of the remedial action with the EPA; 4) attorneys' fees for the present action; and 5) prejudgment interest.

The Air Force moved to dismiss the complaint. The district court dismissed Key Tronic's contribution claim against the Air Force relating to Key Tronic's $4.2 million liability for the consent decree on the ground that it was barred by the Air Force's consent decree. The court denied the motion to dismiss Key Tronic's claim for the $1.2 million in response costs. The court ruled that because Key Tronic's $1.2 million claim was a direct action to recover its own response costs as authorized by section 107(a)(4)(B), it was not barred by the "contribution protection" the EPA granted the Air Force.

After the entry of the order regarding the motion to dismiss, the Air Force and Key Tronic negotiated a consent decree and resolved all the issues of Key Tronic's claims for response costs from the Air Force except for the claim for attorneys' fees and prejudgment interest.

The district court determined that section 107(a)(4)(B) permits private parties to recover attorneys' fees as necessary response costs. 766 F. Supp. 865 (E.D. Wash. 1991). It also awarded prejudgment interest. The Air Force did not appeal from the award of prejudgment interest.

II.

DISCUSSION

A. ATTORNEYS' FEES ARE NOT AUTHORIZED BY CERCLA

The Air Force argues that CERCLA does not authorize courts to award attorneys' fees to a private litigant for legal expenses incurred in connection with cleanup activities or in prosecuting a response

cost recovery action. The Air Force also contends that Key Tronic is not entitled to recover attorneys' fees because it contributed to the contamination of the site. In *Stanton Rd. Assoc. v. Lohrey Enter.*, 984 F.2d 1015 (9th Cir. 1993), we held that a litigant cannot recover in a private response cost recovery action attorneys' fees from a party that was responsible for the pollution. *Id.* at 1020. Thus, the district court lacked the authority to award attorneys' fees in this matter even if Key Tronic did not contribute to the contamination at Colbert.

B. VALIDITY OF THE AWARD OF ATTORNEYS' FEES FOR THE SEARCH FOR OTHER RESPONSIBLE PARTIES

In addition to awarding attorneys' fees for the litigation expenses incurred by Key Tronic in employing outside counsel for the prosecution of this private cost recovery action, the district court also included in its lump sum award an amount for the legal expenses incurred by Key Tronic in conducting an investigation to search for other persons or entities responsible for the pollution. Key Tronic asserts that "the same authority that allows for the recovery of attorneys' fees in the prosecution of a private enforcement action applies to the recovery of costs for the search of other potentially responsible parties." As discussed above, CERCLA does not authorize an award of attorneys' fees in a private response cost recovery action. *Id.* at 1020. Accordingly, the district court lacked the authority to enter an award for the legal expenses incurred by Key Tronic in searching for other potentially responsible parties, whether performed by outside counsel or its general counsel.

C. VALIDITY OF AN AWARD FOR LEGAL EXPENSES IN NEGOTIATING AND PREPARING THE CONSENT DECREE

The district court included in its award of attorneys' fees an amount to cover legal expenses incurred in the employment of outside counsel and the services performed by Key Tronic's general

counsel in preparing and negotiating a consent decree. In support of this award, Key Tronic relies on *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, ____ U.S. ____, 111 S. Ct. 1390, 113 L. Ed. 2d 446 (1991). In that matter, the Eighth Circuit construed section 107(a)(4)(B) as authorizing an award of attorneys' fees in a private cost recovery action. *Id.* at 1422. In *Stanton Rd.*, we declined to adopt the Eighth Circuit's interpretation of the words "necessary response cost" as including an authorization for the award of attorneys' fees. *Stanton Rd.*, 984 F.2d 1015, 1020. The district court erred in awarding attorneys' fees to Key Tronic for its legal expenses in preparing and negotiating the consent decree.

CONCLUSION

Because Congress has not explicitly authorized private litigants to recover their legal expenses incurred in a private cost recovery action, that portion of the district court's judgment awarding attorneys' fees is REVERSED.

CANBY, Circuit Judge, dissenting:

Section 107(a)(4)(B) of CERCLA, 42 U.S.C. § 9607(a)(4)(B), authorizes certain persons who clean up hazardous waste sites to recover "necessary costs of response." In 1986, Congress amended the definition of "response" in section 101(25) to include "enforcement activities relating thereto." 42 U.S.C. § 9601(25). For reasons fully stated in my dissent in *Stanton Road Associates v. Lohrey Enterprises, Inc.*, 984 F.2d 1015, 1020, 1028 (9th Cir. 1993), I conclude that the 1986 amendment was intended to authorize the recovery of attorneys' fees along with cleanup costs.

Because the majority bases its decision on the proposition that attorneys' fees are not recoverable under sections 107(a)(4)(B) and 101(25), I dissent. Having registered my disagreement with the foundation of the majority's opinion, I find no need to address the questions of the recoverability of fees for the search for other responsible parties, or for negotiation or preparing the consent decree.

APPENDIX B

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff,

v.

UNITED STATES of America, United States Air Force; Donald B. Rice, the Secretary of the United States Air Force, in his official capacity; Alumax, Inc., a Delaware corporation, Alumax Fabricated Products, Inc., a Delaware corporation, and Alumax Mill Products, Inc., a Delaware corporation, Defendants.

No. CS-89-694-JLQ.

United States District Court,
E.D. Washington.

March 19, 1991.

As Amended Aug. 12, 1991.

ORDER RE: PLAINTIFF'S MOTIONS FOR SUMMARY JUDGMENT

QUACKENBUSH, Chief Judge.

BE[illegible]E THE COURT is defendant United States' Motion for Enlargement of Time (Ct.Rec. 107), the plaintiff's Motion For Summary Judgment Re: Contribution Claim (Ct.Rec. 99), the plaintiff's Motion For Summary Judgment that Alumax is a Covered Person (Ct.Rec. 103), the plaintiff's Motion for Partial Summary Judgment that Response Costs are Recoverable (Ct.Rec. 94), and defendant United States' Motion to Stay (Ct. Rec.113), heard with

oral argument on March 11, 1991. Mark Schneider and Kathryn Tucker represented the plaintiff. Leslie Nellermoe and William Maer represented defendant Alumax. Eileen McDonough represented the United States Air Force. Having reviewed the record, heard from counsel, and fully considered these matters, the court enters this order to memorialize its oral rulings on these motions.

FACTUAL BACKGROUND

From 1968 to 1986 Spokane County maintained the Colbert Disposal Site ("Colbert") in Spokane County, Washington. From the early 1970s through 1980, the County contracted to have defendant William Schmidt do the work necessary to construct, improve and complete the landfill. In that capacity, Schmidt accepted and disposed of refuse at Colbert. Key Tronic alleges that between 1975 and 1980, Schmidt accepted liquid chemicals from the United States Air Force ("USAF"), Alumax Fabricated Products, Inc. and Alumax Mill Products, Inc. (hereafter collectively "Alumax"), and Key Tronic Corporation, and, therefore, that Key Tronic is entitled to contribution and cost recovery from the USAF and Alumax for monies it paid and expended under the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.*

In 1980 drinking water wells around Colbert were found to be contaminated by various chemicals including "TCA" and "TCE." It is not disputed that Key Tronic had deposited such materials at Colbert. Key Tronic alleges that it incurred, at its own initiative, expenses totaling $1,271,511.10 responding to that discovery. Key Tronic subsequently entered into a Consent Decree and Scope of Work statement with the Washington Department of Ecology ("DOE") and the United States Environmental Protection Agency ("EPA"); as part of that decree, Key Tronic agreed to pay $4.2 million in clean-up costs. The Air Force also entered into a consent decree with DOE and EPA in which the Air Force agreed to pay EPA $1.45 million to resolve its liabilities with the EPA for the Colbert cleanup.

On August 9, 1990, the court entered an order (Ct.Rec. 67) relating to the parties' motions for summary judgment. The court dismissed Key Tronic's contribution claims against the USAF relating to Key Tronic's $4.2 million in liability from the consent decree; however, the court did not dismiss Key Tronic's claim against the USAF for contribution relating to the $1.2 million incurred independently by Key Tronic. The court granted in part Key Tronic's motion for partial summary judgment against the USAF, and held that Key Tronic had established CERCLA liability against the Air Force. The court denied Key Tronic's motion for summary judgment against Alumax and held that Key Tronic had not met its burden of proof in establishing that there was no triable issue of fact as to Alumax's liability under CERCLA. The court dismissed the claims against defendant Schmidt.

The United States and Key Tronic subsequently negotiated a consent decree which was signed by this court on January 14, 1991. *See* Ct.Rec. 92. The consent decree resolved all but the following issues of response cost liability between the United States and Key Tronic:

A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A;

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

Ct.Rec. 92, pp. 2-3.

Key Tronic now brings the following motions for summary judgment. First, Key Tronic moves for summary judgment that its $4.2 million in liability from the consent decree constitutes "recoverable" monies under CERCLA Section 113, 42 U.S.C. § 9613, for purposes of its contribution claim against Alumax. Second, Key Tronic moves for summary judgment that Alumax disposed of hazardous wastes at the Colbert landfill. Third, Key Tronic moves for summary judgment that its independent response costs of $1.2 million are recoverable under CERCLA.

At oral argument, the plaintiff and defendant Alumax informed the court that all claims against defendant Alumax had been settled, and, therefore, that oral argument on the motions as they related to Alumax was unnecessary. The plaintiff and defendant United States informed the court that, should the court rule against the United States, they had stipulated to the quantum of liability and that they would subsequently submit that stipulation to the court.

DISCUSSION

I. MOTIONS DIRECTED SOLELY AGAINST DEFENDANT ALUMAX

Because of the settlement between Key Tronic and Alumax, two of Key Tronic's motions have been mooted. Therefore, Key Tronic's motion that the $4.2 million consent decree is recoverable under CERCLA for contribution purposes, and Key Tronic's motion that Alumax is a covered person under CERCLA ARE HEREBY DENIED AS MOOT.

II. RECOVERABILITY OF "RESPONSE COSTS"

Key Tronic moves this court to hold that monies it spent independently of the Consent Decree are recoverable under

CERCLA as "response costs." By the January 1991 consent decree between Key Tronic and the Air Force, Key Tronic has waived all claims against the United States except for the four items contested. Because Key Tronic has settled its claims with Alumax, these excepted items are the sole remaining claims at issue.

Key Tronic contends the following claims are recoverable from the Air Force under CERCLA as "response costs": (1) prejudgment interest for any liability assessed against the USAF from these motions; (2) attorneys' fees for prosecuting this action; (3) attorneys' and investigators' fees, and opportunity costs of Key Tronic's executive resulting from the search for other potentially responsible parties; and (4) attorneys' fees and opportunity costs of Key Tronic's executive related to the negotiation of the consent decree.[1]

A. Prejudgment Interest Against the USAF

CERCLA waives sovereign immunity with the following statutory provision:

> **Application of Act to Federal Government.** (1) In general. Each department, agency, and instrumentality of the United States (including the executive, legislative, and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any nongovernmental entity, including liability under section 107 of this Act.

42 U.S.C. § 9620(a)(1). CERCLA also provides that prejudgment interest in cost recovery actions is available:

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[1]Because the parties have stipulated to the quantum of liability for these items, the court will address solely the legal issue of recoverability of these items.

> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under [the preceding paragraphs].

42 U.S.C. § 9607.

Based on the foregoing provisions, Key Tronic contends that prejudgment interest may be awarded against the United States Government.

[1] The Government asserts that prejudgment interest may not be awarded against it for sovereign immunity reasons. Absent express congressional consent to the award of interest in addition to a general waiver of immunity to suit, the United States is immune from an interest award. *Library of Congress v. Shaw*, 478 U.S. 310, 106 S. Ct. 2957, 92 L. Ed. 2d 250 (1986). The Government contends that CERCLA does not contain an express waiver of immunity from prejudgment interest as required by *Shaw*, and the general waiver of liability, despite its reference to Section 107 of CERCLA, is legally inadequate to award prejudgment interest.

[2] The court finds the Government's argument to be unpersuasive. *Shaw* involved a statute which provided that the United States shall be liable for costs as a private individual; the statute in *Shaw* did not make any reference to prejudgment interest. The face of 42 U.S.C. § 9620 makes quite clear that Congress waived its sovereign immunity and intended for the Government to be treated as any other private defendant. CERCLA clearly states that in cost recovery actions under § 107 the plaintiff may recover prejudgment interest. Thus, this court holds that CERCLA allows prejudgment interest as an element of damages against the United States.

B. Attorneys' Fees for Prosecuting this Action

[3] Attorneys' fees may not be recovered without a specific statutory provision allowing such a recovery. *Alyeska Pipeline Co. v.*

Wilderness Society, 421 U.S. 240, 262, 95 S. Ct. 1612, 1624, 44 L. Ed. 2d 141 (1975). CERCLA does not have a provision which specifically states that enabling plaintiff is entitled to recover "attorney's fees." Liability of responsible parties under § 107 includes the necessary costs of response resulting from a hazardous waste release or threatened release. 42 U.S.C. § 9607. In the definitions section, "respond or response means remove, removal, remedy, and remedial action, all such terms (including the terms remand and remedial action) include *enforcement activities related thereto*." (emphasis supplied) 42 U.S.C. § 9601(25). CERCLA does not define "enforcement" or "enforcement activity."

CERCLA permits citizens who sue under the citizens' suit provision, 42 U.S.C. § 9659, to obtain relief from a district court. The court may not award money damages but may grant such relief in order to correct the violations and may impose civil penalties. The court may award to the prevailing party the costs of litigation, including attorneys' fees. 42 U.S.C. § 9659(f).

CERCLA provides special recovery measures for the United States Government. Section 107 permits the United States to recover all removal or remedial costs incurred which are not inconsistent with the national contingency plan. "Removal" costs are defined as including any actions taken under Section 104(b) of the Act. 42 U.S.C. § 9601(23). Section 104(b) permits the Government to incur legal costs and to recover those costs. 42 U.S.C. § 9604(b)(1). Case law establishes that the United States may recover its litigation costs under CERCLA. *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848, 108 S. Ct. 146, 98 L. Ed. 2d 102 (1987); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1986), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106, 109 S. Ct. 3156, 104 L. Ed. 2d 1019 (1989).

Key Tronic asserts that it is entitled to its legal fees because the attorneys' fees required to bring this § 107 cost recovery action are

"enforcement costs" recoverable as a necessary response cost. Key Tronic first cites two cases in which the Ninth Circuit characterized a Section 107 cost recovery claim by a private party as a "private enforcement action." *Cadillac Fairview, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). From these cases Key Tronic contends that the recovery of attorneys' fees through the enforcement cost language has already been resolved. However, the Ninth Circuit's characterization of the cost recovery action appears to be dicta as the holdings of those cases did not turn upon the enforcement action language.

Some courts addressing this issue have held that attorneys' fees are recoverable. For example, in *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), the Eighth Circuit held that a private party bringing a cost recovery action under § 107 could recover attorneys' fees for bringing the action. In that case, General Electric purchased a piece of land on which Litton had previously dumped toxic wastes. GE entered into a settlement agreement with the state authorities, agreed to clean up the waste site, and subsequently sued Litton for its response costs pursuant to Section 107 of CERCLA. In holding that attorneys' fees were recoverable, the court gave the following rationale:

> [CERCLA] defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA

> authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site. (citations omitted)

920 F.2d at 1422. Two district courts have reached the same result with similar reasoning. *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990); *Shapiro v. Alexanderson*, 741 F. Supp. 472, 480 (S.D.N.Y. 1990).

Other district courts have held that attorneys' fees are not recoverable under CERCLA. *United States v. Hardage*, 750 F. Supp. 1460, 1511 (W.D. Okla. 1990); *Fallowfield Development Corp. v. Strunk*, 1990 WESTLAW 52745, *5-6* (E.D. Pa. 1990); *Mesiti v. Microdot, Inc.*, 739 F. Supp. 57, 62-63 (D.N.H. 1990); *Regan v. Cherry Corp.*, 706 F. Supp. 145, 149 (D.R.I. 1989); *T & E Indus., Inc. v. Safety Light Corp.*, 680 F. Supp. 696, 708 (D.N.J. 1988); *BCW Associates v. Occidental Chemical Corp.*, 1988 WESTLAW 102641, *23 (E.D. Pa. 1988); *Hemingway Transportation, Inc. v. Khan*, 108 B.R. 378, 383 (Bkrtcy. D. Mass. 1989). One of the leading cases for this position is *T & E Indus., Inc. v. Safety Light Corp., supra*. Like the facts in *Litton*, T & E unknowingly purchased property with a hazardous waste site. T & E sued Safety Light, a successor to the original polluter, for both its cleanup costs and attorneys' fees as response costs. The court held that CERCLA generally intended to distinguish between costs recoverable to the government and those recoverable by private entities. *Id.* at 707-8.

The court found that while the government could obtain attorneys' fees pursuant to § 104(b), private parties had no comparable entitlement. *Id.* Without further explanation, the court rejected the plaintiff's argument that attorneys' fees for bringing the action were recoverable as enforcement activities related to response expenditures on the basis that private parties cannot incur enforcement costs. *Id.* at 708, n. 13.

Another court rejecting attorneys' fees in cost-recovery actions emphasized the legislative history related to the amendment to the Act which added the "enforcement activities thereto" language. *Fallowfield Development Corp. v. Strunk*, 1990 WESTLAW 52745 (E.D. Pa. 1990). The Committee on Energy and Commerce had made the following comments on § 101:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 253, 99th Cong., 1st sess., pt. 1, at 66-67 (1985), reprinted in 1986 U.S. Code Cong. & Admin. News, 2835, 1848-49. From that language the court concluded that when Congress expanded the definition of response costs to include enforcement costs, Congress did not intend for private parties to obtain attorneys' fees as part of a cost recovery action. *Fallowfield*, 1990 WESTLAW 52745, at *6.

In this case, the Government contends that CERCLA's statutory scheme, taken as a whole, evidences a Congressional intent to provide attorneys' fees for the Government but not for private parties. First, the Government points out that CERCLA does not explicitly authorize attorneys' fees as part of a § 107 cost-recovery claim. In contrast, Congress explicitly provided for attorneys' fees for citizen's suits, 42 U.S.C. § 9659, and for response actions by the United States, 42 U.S.C. § 9604. The Government argues, therefore,

that when Congress wanted to provide for attorneys' fees, it did so explicitly, and the failure to make such a provision in § 107 demonstrates the Congressional intent to deny attorneys' fees under Section 107.

The Government further asserts that the statute, taken as a whole, shows that only the Government may bring an "enforcement action." The Government asserts that an enforcement action is an action to compel compliance with CERCLA. The United States may bring such an action under § 104 or § 106 (and private citizens under § 310), but private parties may only bring contribution actions under § 113 or cost recovery claims under § 107. The Government also relies upon the two sentences of the legislative history cited by the *Fallowfield* court. Thus the Government contends that even if the court rejects the Government's argument that attorneys' fees are unavailable because of a lack of explicit statutory authority under § 107, attorneys' fees are nevertheless unrecoverable because a private party cannot incur costs of enforcement activities.

[4,5] The court rejects both of the Government's contentions. As an initial matter, "CERCLA is essentially a remedial statute designed by Congress to protect and preserve public health and the environment, courts are obligated to construe its provisions liberally to avoid frustration of the beneficial legislative purposes in the absence of a specific congressional intent otherwise." *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 804 (9th Cir. 1989) (quoting *Dedham Water Co. v. Cumberland Farms Dairy, Inc.*, 805 F.2d 1074, 1081 (1st Cir. 1986)). "Congress intended that those responsible for problems caused by the disposal of chemical poisons bear the cost and responsibility for remedying the harmful conditions they created." *Pinole Point Properties v. Bethlehem Steel Corp.*, 596 F. Supp. 283, 287 (N.D. Cal. 1984) (quoting *United States v. Reilly Tar & Chemical Corp.*, 546 F. Supp. 1100 (D. Minn. 1982). Thus, absent specific Congressional intent to the contrary, CERCLA should be interpreted liberally to permit recovery associated with identifying of potentially responsible parties and forcing those responsible parties to share their fair portion of the cleanup of a hazardous waste site.

The court must reject the Government's "express statutory authorization" argument. *Alyeska*, *supra*, stood for the proposition that the federal courts may not award attorneys' fees in the complete absence of any statutory authority. 421 U.S. at 269, 95 S. Ct. at 1627. In that case the Court of Appeals had found that the case did not fit into any of the recognized exceptions to the "American rule" but nevertheless awarded attorneys' fees because the litigation had been beneficial to the public and had ensured that the governmental system functioned properly. *Id.* at 245, 95 S. Ct. at 1615-16. The Supreme Court held that a judicially created rule awarding attorneys' fees was improper and therefore reversed the decision by the Court of Appeals. *Id.* at 269-70, 95 S. Ct. at 1627-28.

Unlike *Alyeska*, the plaintiff in this case points to a statutory provision which entitles the recovery of all necessary response costs. The statute defines response costs as including "enforcement activities." 42 U.S.C. § 9601(25). Thus, the issue for the court is only whether a private party can incur enforcement costs.

The court finds that a private party may incur enforcement costs, and, therefore, may recover attorneys' fees for bringing a cost recovery action under § 107. Congress drafted Section 101(25) to establish the scope of response costs recoverable throughout CERCLA; thus, the definition of response, on its face, applies to both the Government and private parties. Congress failed to restrict "enforcement activities" in that definition to governmental actions.

Although the court acknowledges the force of the Government's position that the statutory scheme implies that enforcement activities are those actions taken by the EPA to require compliance with CERCLA, the court must construe the provisions of § 107 and § 101(25) liberally to achieve the overall objectives of the statute.[2]

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[2]The court notes that the two sentences of legislative history cited by the Government fail to make any reference to private parties. The court cannot conclude from these statements that Congress intended to deny recovery to private parties for enforcement activities.

The court further finds that the cases cited, infra p. 869-870, are more persuasive. Read as a whole, the statute clearly meant for those responsible for dumping chemical wastes to pay for the cleanup of those wastes. If the court narrowly read the statute as the Government suggests, then even innocent purchasers of property who clean up hazardous wastes and subsequently seek recovery from the responsible parties would be unable to recover the entirety of the expenses incurred in holding the responsible parties accountable for their pollution.[3] Accordingly, the court concludes that enforcement costs must be read broadly, and thus includes therein attorneys' fees for making responsible parties share necessary response costs.

C. PRP Search Costs

Key Tronic also seeks to recover the costs of its executive, outside investigators' fees, and attorneys' fees relating to the search for potentially responsible parties. The Government acknowledges that PRP search costs are recoverable when sought by the EPA when enforcing CERCLA. Both parties acknowledge that the case law does not specifically discuss a private party's PRP search costs.

[6] The court finds its holding on enforcement activities and expenses recoverable thereunder to be applicable. Having held that the enforcement cost language of CERCLA must be read broadly, this court concludes that the search for responsible parties is an

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[3]The court is not persuaded that *Litton* should be read as a clean-hands case. If enforcement costs were read to cover only the Government's expenses in compelling compliance with the statute, then persons with clean hands who bring cost recovery actions would also be denied a statutory mechanism to recover their attorneys' fees. The court cannot find a statutory basis to justify an analytical distinction between those who have clean hands and bring a cost recovery action and those who do not.

enforcement activity within the meaning of CERCLA.[4] For the reasons articulated by the court in permitting the recovery of the attorneys' fees in bringing this legal action, the court must find the PRP search costs to be recoverable.

D. Costs Incurred by Key Tronic's Attorneys and Executive in Negotiation of the Consent Decree

Courts have held that consultant and legal fees incurred in the investigation of a hazardous waste site are recoverable as necessary response costs. *International Clinical Laboratories, Inc. v. Stevens*, 1990 WESTLAW 43971, 1990 U.S. Dist. LEXIS 3685 (E.D.N.Y. 1990); *BCW Associates v. Occidental Chem. Corp.*, 1988 WESTLAW 102641, 1988 U.S. Dist. LEXIS 11275.

[7] The court finds that the attorneys' fees and executive's opportunity costs in negotiating Key Tronic's consent decree are necessary response costs in cleaning up the Colbert landfill. The court cannot accept the Government's argument that such costs are not recoverable solely because attorneys (as opposed to engineers) carried out work necessary to solving the problems at Colbert.[5] The court further notes that the Government does not contend that these fees are recoverable only as "enforcement activities." Because these expenses were necessary response costs, the court finds that these costs are recoverable under CERCLA.

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[4]Indeed, Key Tronic asserts, and the Government does not refute, that Key Tronic's efforts in identifying responsible parties and establishing the Air Force's disposal of wastes at Colbert resulted in the EPA's action against the Air Force.

[5]The Government did not raise the issue of whether Key Tronic might have been foreclosed from recovering attorneys' fees related to obtaining a consent decree for the same reasons that Key Tronic may not seek contribution for the $4.2 million liability of the consent decree. The Government instead has defended solely on the basis that Key Tronic's attorneys' fees are not response costs.

MOTION TO STAY

The United States moves the court stay its decision on the quantum of damages. The parties having represented that they will submit a stipulation as to the amount of damages, the defendant's motion IS HEREBY DENIED AS MOOT. The parties shall submit their stipulation to the court within 30 days of the entry of this order.

IT IS HEREBY ORDERED:

1. Defendant United States' Motion for Enlargement of Time (Ct.Rec. 107) IS HEREBY GRANTED.

2. The plaintiff's Motion (F)or Summary Judgment Re: Contribution Claim (Ct.Rec. 99) against defendant Alumax IS HEREBY DENIED AS MOOT.

3. The plaintiff's Motion For Summary Judgment that Alumax is a Covered Person (Ct.Rec. 103) IS HEREBY DENIED AS MOOT.

4. The plaintiff's Motion for Partial Summary Judgment that Response Costs are Recoverable (Ct.Rec. 94) IS HEREBY GRANTED as herein stated. Within 30 days of the entry of this order, the plaintiff and defendant United States shall submit their stipulation as to the quantum of liability.

5. Defendant United States' Motion to Stay (Ct.Rec. 113) IS HEREBY DENIED AS MOOT.

IT IS SO ORDERED.

APPENDIX C

STANTON ROAD ASSOCIATES,
Plaintiff-Appellee,

v.

LOHREY ENTERPRISES, Electronic Valet Systems, Inc., David Lohrey, Nathan Pang, Defendants-Appellants.

No. 91-15729.

United States Court of Appeals,
Ninth Circuit.

Argued and Submitted Nov. 2, 1992.

Decided Jan. 28, 1993.

Before: SNEED, ALARCON and CANBY, Circuit Judges.

ALARCON, Circuit Judge:

Appellants Lohrey Enterprises, Inc., Electronic Valet Systems, Inc., David Lohrey, and Nathan Pang (collectively, "Lohrey") appeal from the award of attorneys' fees to Stanton Road under section 107(a)(4)(B) of the Comprehensive Environmental Response, Compensation, and Liability Act of 1980, as amended ("CERCLA"), 42 U.S.C. § 9607(a)(4)(B). Lohrey also seeks reversal of the order requiring it to pay $1,100,000 in monetary damages to Stanton Road Associates ("Stanton Road") for deposit in an escrow account to fund the clean-up of Stanton Road's property.

[1,2] This case presents us with two novel issues. First, we must decide whether Congress has explicitly authorized attorneys' fees to private litigants as part of the response costs incurred in

cleaning up property contaminated by a hazardous substance. We are also confronted with the question regarding whether a district court may order a party found liable for contamination to pay monetary damages for deposit in an escrow account to fund the future clean-up of the contamination.

We conclude that Congress has not expressly provided for an award of attorneys' fees to private parties seeking to recoup response costs under CERCLA. We further hold that the order that Lohrey pay $1,100,000 in monetary damages to Stanton Road constitutes an award of future response costs in violation of CERCLA. We reverse the award of attorneys' fees and vacate the order requiring Lohrey to pay $1,100,000 to Stanton Road as monetary damages to fund a future response action.

I.

Lohrey owned and operated a dry cleaning plant on property contiguous to Stanton Road's property. While the dry cleaning plant was in operation, the hazardous chemical perchlorethelene was allowed to spill onto the adjoining alley. The chemical contaminated Stanton Road's property. Stanton Road brought this action seeking declaratory relief and response costs under CERCLA, and damages under pendent state law claims alleging trespass, negligence, and nuisance.

At trial, Stanton Road introduced expert testimony that the clean-up of Stanton Road's property would cost between $775,000 and $1,100,000. Stanton Road also introduced evidence that the minimum amount of funding necessary for an environmental firm to undertake the clean-up would be $1,100,000. Lohrey did not offer any evidence at trial to contradict Stanton Road's testimony regarding the estimated cost of the proposed remediation.

The district court found Lohrey liable for the contamination. The court awarded Stanton Road $77,374 in response costs, $389,925 in damages under the state law claims, and $126,198 in attorneys' fees under CERCLA. Lohrey was also ordered to pay

Stanton Road $1,100,000 to fund the clean-up of Stanton Road's property. That portion of the order provides as follows:

> *Defendants, jointly and severally, are ordered to pay to Stanton the additional sum of one million one hundred thousand dollars ($1,100,000).* Stanton shall deposit said sum in an interest bearing escrow trust account ("Cleanup Escrow") established to implement the remediation of 860 Stanton Road as expeditiously as possible by the environmental consulting firm PES Environmental, Inc. ("PES"). Defendants shall have no control over the Cleanup Escrow fund, other than to monitor the expenditures therefrom. Payments from the Cleanup Escrow fund for cleanup services rendered shall be paid out as invoices are received and word is reviewed and approved by PES principals. Copies of said invoices shall be provided to a party to be designated jointly by all defendants.
>
> The Cleanup Escrow will terminate upon written certification from PES that the 860 Stanton Road property has been remediated in accordance with all relevant regulatory cleanup levels and requirements.
>
> If unused funds remain in the Cleanup Escrow at the time of termination, such funds will be distributed as follows:
>
> First, all unused funds shall be paid out to Stanton in order to satisfy any money damages awarded to Stanton in this judgment that remain unpaid as of the date of the termination of the escrow. . . . *In the event all*

> *monetary damages awarded Stanton* have been satisfied in full upon termination of the Cleanup Escrow, all remaining sums shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow.

(emphasis added).

The judgment was entered on April 15, 1991. Lohrey filed a timely notice of appeal. It did not seek a stay of the judgment until May 29, 1992. The district court denied the motion.

The district court did not indicate in its judgment whether the monetary damages were awarded pursuant to CERCLA or under the pendent state law claims. In an attempt to clarify the basis for the award of monetary damages, we issued an order requesting the district court to enter an order indicating whether its award was based on state law or CERCLA. In response, the district court informed us that it awarded Stanton Road $1,100,000 under both CERCLA and state law.

II.

Attorneys' Fees

[3] Lohrey contends that the district court erred in awarding attorneys' fees to Stanton Road. They argue that CERCLA does not authorize attorneys' fees in private response cost actions. We review the district court's interpretation of CERCLA de novo. *Idaho v. Howmet Turbine Component Co.*, 814 F.2d 1376, 1378 (9th Cir. 1987).

Stanton Road contends that a private litigant may recover attorneys' fees under CERCLA as "necessary costs of response" pursuant to 42 U.S.C. § 9607(a)(4)(B). Section 9607(a) provides in pertinent part:

> [A]ny person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of . . . shall be liable for . . . any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a). Section 101(25) defines "response" as "remove, removal, remedy, and remedial action, . . . includ[ing] *enforcement activities related thereto*." 42 U.S.C. § 9601(25) (emphasis added). Stanton Road maintains that an action by a private litigant to recover response costs is an "enforcement activity" within the meaning of the statute.

The question whether CERCLA authorizes private parties to recover attorneys' fees as enforcement costs is a matter of first impression in this circuit. The Eighth Circuit has concluded that CERCLA authorizes private parties to recover attorneys' fees as "necessary costs of response." *General Elec. Co. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1421-22 (8th Cir. 1990), *cert. denied*, _____ U.S. _____, 111 S. Ct. 1390, 113 L. Ed. 2d 446 (1991). The Eighth Circuit reasoned that a "private party cost-recovery action . . . [under section 107(a)(4)(B)] is an enforcement activity within the meaning of the statute." *Id.*

While we characterized an action to recover costs under section 107(a)(4)(B) in *Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) as a private response action, we were not required to consider in that matter whether CERCLA authorizes a private party to recover its attorneys' fees. In *Cadillac Fairview*, we held that a private litigant may initiate an action pursuant to section 107(a) to recover the costs of testing for contamination and employing a guard service in responding to the hazardous substances, without waiting for governmental action concerning the contaminated site. *Id.* at 694-95.

The district courts in this circuit disagree on the question whether response costs include attorneys' fees incurred by private litigants. *Compare Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945, 952 (C.D. Cal. 1990) (private parties may recover attorneys' fees as costs of response under section 107(a)(4)(B) *with Santa Fe Pac. Realty Corp. v. United States*, 780 F. Supp. 687, 695 (E.D. Cal. 1991) (attorneys' fees are not recoverable as response costs under section 107(a)(4)(B).

Under the American Rule, a prevailing party may not recover attorneys' fees. *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d 141 (1975). In *Alyeska*, the plaintiffs temporarily halted construction of an oil pipeline in Alaska. *Id.* at 242, 95 S. Ct. at 1614. The Court of Appeals for the District of Columbia awarded attorneys' fees to the plaintiffs. *Id.* at 245, 95 S. Ct. at 1615. The court reasoned that the plaintiffs had vindicated "important statutory rights of all citizens" and had insured that the governmental process had functioned properly. *Id.* Thus, they were entitled to attorneys' fees to encourage private parties to undertake litigation that benefits the public. *Id.* at 245-46, 95 S. Ct. at 1616.

The Supreme Court reversed. The Court instructed that under the American Rule, a prevailing party cannot recover attorneys' fees in the absence of congressional authority. *Id.* at 269, 95 S. Ct. at 1627. The Court stated that it was up to Congress to "carve out specific exceptions" to the general rule against providing attorneys' fees to the prevailing litigant. *Id.* The Court reasoned that a court is not

> free to fashion drastic new rules with respect to the allowance of attorneys' fees to the prevailing party in federal litigation or to pick and choose among plaintiffs and the statutes under which they sue and to award fees in some cases but not in others, depending upon the courts' assessment of the importance of

> the public policies involved in particular cases.

Id.

In *Runyon v. McCrary*, 427 U.S. 160, 96 S. Ct. 2586, 49 L. Ed. 2d 415 (1976), the Court explained that "the law of the United States . . . has always been that absent *explicit* congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Id.* at 185, 96 S. Ct. at 2602 (emphasis added). The Court stated that attorneys' fees cannot be awarded unless "Congress intended to set aside [a] long-standing American rule of law." *Id.* at 185-86, 96 S. Ct. at 2602.

We are persuaded that the words "enforcement activities" as used in section 101(25) do not explicitly authorize the payment of attorneys' fees. Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule.

For example, in section 310(f) of CERCLA, congress authorized courts to "award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing party or the substantially prevailing party whenever the court determines such an award is appropriate" in citizen suit actions. 42 U.S.C. § 9659(f). Similarly, section 104(b) of CERCLA provides that the "President . . . may undertake such planning, *legal*, fiscal, [or] economic, . . . to plan and direct response actions [and] to recover the costs thereof." 42 U.S.C. § 9604(b) (emphasis added). When compared to the express provisions for attorneys' fees in these sections of CERCLA, the term "enforcement activities" would appear to be "outside even the most exhaustive lexicon of customary fee shifting language." *Santa Fe Pac. Realty*, 780 F. Supp. at 695. Moreover, the fact that those district courts that have confronted this issue disagree on the question whether attorneys' fees are allowable under section 101(25) and 107(a)(4)(B) demonstrates that the words "enforcement activities" do not explicitly signal, with any persuasive degree of clarify, that Congress intended to provide for an award of

attorneys' fees to private litigants. *See Litton*, 920 F.2d at 1422 n. 10 (noting that district courts have split on whether attorneys' fees are recoverable by private parties as a necessary cost of response).

[4,5] Ordinarily, where there is a dispute regarding whether a statute applies to the facts before the court, we first look to the plain meaning of the language used by Congress. *Wilshire Westwood Assoc. v. Atlantic Richfield*, 881 F.2d 801, 803 (9th Cir. 1989). If the words used in the statute are ambiguous, however, we must consult the legislative history to determine the intent of Congress. *Blum v. Stenson*, 465 U.S. 886, 896, 104 S. Ct. 1541, 1548, 79 L. Ed. 2d 891 (1984). The rule set forth in *Alyeska* and *Runyon*, however, precludes us from implying from ambiguous language an intent that attorneys' fees can be awarded in a private response action. Under *Alyeska* and *Runyon*, the American Rule must be applied unless Congress explicitly authorizes the courts to award attorneys' fees. *Alyeska*, 421 U.S. at 269, 95 S. Ct. at 1627; *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601. The words "necessary costs of response" do not expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property.

Stanton Road argues that we should adopt the Eighth Circuit's interpretation of the words "necessary costs of response." We decline to do so because we are unpersuaded by the Eighth Circuit's analysis of the issue.

The Eighth Circuit's explanation of its holding is contained in the following paragraph:

> As noted earlier, 42 U.S.C. § 9607(a)(4)(B), allows private parties to recover "necessary costs of response . . . consistent with the national contingency plan." 42 U.S.C. § 9601(25) defines "response" as "remove, removal, remedy, and remedial action; all such terms (including the terms 'removal' and 'remedial action') *including enforcement activities related thereto*." (Emphasis added).

> A private party cost-recovery action such as this one is an enforcement activity within the meaning of the statute. *See Cadillac Fairview/California, Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986). Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter (such as GE) were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

Litton, 920 F.2d at 1421-22 (emphasis in the original).

We agree with the Eighth Circuit that attorneys' fees are ordinarily expended in a private response action. This truth does not, however, permit a federal court to read into the phrase, "necessary costs of response," explicit congressional authority to award attorneys' fees. Attorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel. The cost of representation cannot be shifted

by implication under the American Rule. *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601. A holding that attorneys' fees are not explicitly authorized in a private response action does not "read them out" of section 9607(a)(4)(B), as suggested by the Eighth Circuit. To the contrary, to uphold the district court's award of attorneys' fees in a private response action, we would have to read into the statute words not explicitly inserted by Congress. The Supreme Court instructed us in *Alyeska* and *Runyon* that we lack such power.

The Eighth Circuit's reliance on the policy underlying CERCLA to support its conclusion that Congress must have intended that litigants may recover attorneys' fees in a private response action is also misplaced. We cannot imply authority to award attorneys' fees because we determine that such a rule would enhance public policy. The Supreme Court rejected this notion in *Alyeska*:

> It is true that under some, if not most, of the statutes providing for the allowance of reasonable fees, Congress has opted to rely heavily on private enforcement to implement public policy and to allow counsel fees so as to encourage private litigation.... But congressional utilization of the private-attorney-general concept can in no sense be construed as a grant of authority to the Judiciary to jettison the traditional rule against nonstatutory allowances to the prevailing party and to award attorneys' fees whenever the courts deem the public policy furthered by a particular statute important enough to warrant the award.

Alyeska, 421 U.S. at 263, 95 S. Ct. at 1624.

If Congress determines that an exception to the American Rule is appropriate in private response actions, it will do so in explicit terms as it has previously done in other parts of CERCLA. *See* 42 U.S.C. §§ 9604(b), 9659(f). Because Congress has not explicitly

authorized an award of legal expenses as necessary response costs, the district court had no authority to award attorneys' fees to Stanton Road. *Runyon*, 427 U.S. at 185, 96 S. Ct. at 2601.

III.

Validity of the Award of Monetary Damages for Future Response Acts

1. Mootness

[6] Stanton Road asserts that the validity of the order requiring Lohrey to pay monetary damages in the sum of $1,100,000 is moot because most of the funds placed in the escrow account have been expended to pay for remediation costs. We disagree. Lohrey appeals from the judgment ordering it to pay monetary damages to Stanton. The fact that payments have been made in satisfaction of a money judgment does not foreclose an appeal. *United States ex rel. Morgan & Son Earth Moving, Inc. v. Timberland Paving & Constr. Co.*, 745 F.2d 595, 598 (9th Cir. 1984).

2. Waiver

[7] The parties disagree regarding whether Lohrey objected before the trial court to the validity of the order requiring it to pay $1,100,000 in monetary damages to Stanton Road for deposit in an escrow account. We need not decide whether the issue was raised in the district court because the question whether CERCLA permits the recovery of future response costs is a matter of law, and the challenged order is part of the record. See *White v. McGinnis*, 903 F.2d 699, 700 n.4 (9th Cir.) (en banc) (appellate courts may consider issues raised for first time on appeal if the "issue is purely one of law and the pertinent record has been fully developed") *cert. denied*, 498 U.S. 903, 111 S. Ct. 266, 112 L. Ed.2d 223 (1990) (quoting *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980)).

3. Validity of The Award of Future Response Costs Under CERCLA

[8] Lohrey contends that the district court erred in ordering Lohrey to pay Stanton Road $1,100,000 to fund the clean-up of its property, because CERCLA prohibits awards of future response costs. We agree.

In ordering Lohrey to pay future response cost damages, the court believed that it could avoid holding further proceedings at which Stanton Road would be required to show that the costs it incurred were necessary to clean up the contamination and were consistent with the national contingency plan. The district court explained its motivation as follows:

> I am just going to give you a judgment and give you an amount of money of what it would take [to clean up the property]. In these cases the court would have 50,000 cases on their docket waiting some sort of a resolution. I don't know if declaratory relief is really a basis of sense in this case.

Section 107(a)(4)(B) permits a private party to recover costs incurred in responding to the contamination. 42 U.S.C. § 9607(a)(4)(B). CERCLA further provides for a declaratory judgment action to establish liability for future response costs. 42 U.S.C. § 9613(g)(2). Section 9607(a)(4)(B) limits damages in private response actions to expenses that were "necessary" and "consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B). We held in *Dant & Russell v. Burlington N. R.R. Co.* that CERCLA requires plaintiffs "to actually incur response costs before they can recover them." 951 F.2d 246, 250 (9th Cir. 1991). Thus, the district court erred in ordering Lohrey to pay monetary damages of $1,100,000 for clean-up costs that Stanton Road had not incurred. Furthermore, because Stanton Road had not cleaned up its property at the time the district court entered its judgment, it failed to meet its burden of proving in an adversary

proceeding that its expenses were necessary and incurred in a manner consistent with the national contingency plan. See *Cadillac Fairview*, 840 F.2d at 695 ("To recover costs under section 107(a) the party undertaking the response action must prove that the costs it incurred were 'necessary' and that it incurred those costs in a manner 'consistent with the national contingency plan.'").

The award of monetary damages to Stanton Road to fund a future clean-up of Stanton Road's property violated CERCLA. Therefore, that portion of the award of monetary damages that was based on CERCLA cannot stand.

4. Validity of the Award of Monetary Damages Under State Law

[9] The district court has informed this court that the $1,100,000 monetary damage award was ordered pursuant to both CERCLA and state law. Lohrey contends that an award of monetary damages under state law is invalid because it would permit the plaintiff to circumvent the requirement under CERCLA that response costs be necessary and consistent with the national contingency plan. This argument is meritless.

CERCLA provides that "[n]othing in this chapter shall affect or modify in any way the obligations or liabilities of any person under other Federal or State law, including common law, with respect to releases of hazardous substances or other pollutants or contaminants." 42 U.S.C. § 9652(d). CERCLA further precludes a plaintiff from recovering cost of repair damages under both CERCLA and state law. 42 U.S.C. § 9614(b). Thus, the express language of the statute defeats Lohrey's contention that CERCLA preempts a state law recovery. See *Manor Care, Inc. v. Yaskin*, 950 F.2d 122, 127 (3d Cir. 1991) (the prohibition in 42 U.S.C. section 9614(b) against double recovery for removal costs "would be unnecessary and inexplicable if . . . costs that may be recovered under CERCLA may not be recovered under state law").

Lohrey further contends that the district court awarded Stanton Road damages for the diminution in market value of its property under state law. Lohrey argues that the award of monetary damages in the sum of $1,100,000 will result in a double recovery under state law. See *Armitage v. Decker*, 218 Cal. App. 3d 887, 905, 267 Cal. Rptr. 399 (1990) ("[T]he cost of repair . . . and the difference in market value before and after injury are alternate means of achieving [the same] . . . compensation [for tortious injury to property.]") (emphasis added).

Contrary to Lohrey's contention, the district court did not award Stanton Road damages for diminution of the market value of the property due to the contamination. Rather, the district court found that Stanton Road contracted to sell the property for $1,420,000 on September 1, 1988, and that the buyer refused to go through with the sale upon learning of the contamination. On January 31, 1990, Stanton Road entered into a contract with another buyer to sell the property, with the sale being contingent on Stanton Road's remediation of the property. The district court awarded Stanton Road $199,159, representing the loss of use of $1,420,000 from September 1, 1988 to January 31, 1990 at 9.25% interest. The district court also awarded damages to Stanton Road for expenses incurred in maintaining the property from September 1, 1988 to January 31, 1990. The award of damages was not intended to compensate Stanton Road for the lost market value of the property.

IV.

CONCLUSION

The award of monetary damages for future response costs violated CERCLA and must be vacated. The district court failed to indicate what portion of the monetary damages awarded to Stanton Road was compensation for the costs of repair based on a finding of liability under the state law claims.

Accordingly, we vacate the award of monetary damages. Upon remand, the district court is directed to conduct further proceedings.

Before awarding any response costs under CERCLA, the district court must require Stanton Road to meet its burden of proof under section 9607(a)(4)(B) that any clean up expenses it incurred were necessary and consistent with the national contingency plan. If the court determines that damages should be awarded under state law, it is requested to prepare express findings and conclusions of law that specify the cost and the nature of the repairs attributable to a violation of state law.

VACATED and REMANDED with directions.

CANBY, Circuit Judge, dissenting:

With all respect, I cannot agree with two major conclusions reached by the majority. In my view, plaintiff's attorneys' fees are properly recoverable under section 107(a)(4)(B) and the amended version of section 101(25) of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a)(4)(B) and 9601(25). In addition, I would not reserve the district court's establishment of an escrow fund, nor would I reach the question of that court's power to create such a fund, because I believe that this issue was never properly raised by the defendants in the district court.[1]

Attorneys' Fees

The plaintiff, Stanton Road, owns land that the defendants contaminated by repeated discharges of perchlorethelene over a period of years. Accordingly, Stanton Road is entitled under section 107(a)(4)(B) of CERCLA to recover from the defendants its "necessary costs of response." When CERCLA was first enacted, "response" was defined in section 101(25), 42 U.S.C. § 9601(25), as follows: "'respond' or 'response' means remove, removal, remedy, and remedial action." Had this case arisen between 1980 and 1986,

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[1] I agree with the majority's conclusion that the case is not moot, and with its treatment of the validity of the damages award under state law.

then, Stanton Road would have been entitled to recover its "costs of remedial action." Those recoverable costs might reasonably have been interpreted to be only those incurred in the physical cleanup of the site.

In 1986, however, Congress enacted the Superfund Amendment and Reauthorization Act, which amended section 101(25) of CERCLA to provide: "The terms 'respond' or 'response' means remove, removal, remedy, and remedial action, *all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.*" (Emphasis added). In the scheme of CERCLA, this language must mean that private plaintiffs can recover the attorneys' fees expended in enforcing the liabilities that CERCLA imposes on polluters.

CERCLA is to a large degree a machine driven by private litigation or the threat of it. As the plurality opinion of the Supreme Court in *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 109 S. Ct. 2273, 105 L. Ed.2d 1 (1989), observed:

> Congress did not think it enough . . . to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Id. at 21-22, 109 S. Ct. at 2285. Thus our court has not hesitated to characterize private actions under section 107 of CERCLA as "private enforcement actions." *Wickland Oil Terminals v. ASARCO, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986); *Cadillac Fairview/California, Inc. v. Dow Chemical Co.*, 840 F.2d 691, 694 (9th Cir. 1988).

When Congress amended CERCLA to permit such private litigants, among others, to recover the "costs" of "enforcement activities," it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. The "enforcement" of CERCLA by a private party consists in suing to hold the polluter liable. The lion's share of the enforcement cost, as opposed to cleanup cost, will lie in attorneys' fees. Congress cannot have been ignorant of that fact. A private party simply cannot recover its cost of enforcement if it cannot recover its attorneys' fees. If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable.

This is the conclusion reached by the only other circuit to have addressed the question.[2] In *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), the Eight Circuit ruled:

> Attorney fees and expenses are necessarily incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the "necessary costs" that section 9607(a)(4)(B) allows private parties to recover. We therefore conclude that CERCLA authorizes, with a sufficient degree of explicitness, the recovery by private parties of attorney fees and expenses. This conclusion based on the

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[2]The question whether private parties could recover litigation costs under section 107(a)(4)(B) was recently presented to the Tenth Circuit, but that court declined to address that broad question. See *United States v. Hardage*, 982 F.2d 1436, 1447 (10th Cir. 1992). It affirmed a denial of the fees on the narrower ground that the district court had not erred in its factual determination that the litigation costs had not been necessary. Id. at 1447-48.

> statutory language is consistent with two of the main purposes of CERCLA--prompt cleanup of hazardous waste sites and imposition of all cleanup costs on the responsible party. These purposes would be undermined if a non-polluter . . . were forced to absorb the litigation costs of recovering its response costs from the polluter. The litigation costs could easily approach or even exceed the response costs, thereby serving as a disincentive to clean the site.

Id. at 1422.

The majority here resists reading "costs" of "enforcement activities" to include attorneys' fees because Congress elsewhere has used the phrase "attorneys' fees" or, less explicitly, "legal costs." Of course it would have made our task easier if Congress had used the term "attorneys' fees" in its amendment to section 101(25). But Congress is not confined to a particular linguistic formula; it need only manifest its clear intention to permit the litigant to recover fees. As the Eighth Circuit convincingly demonstrated, Congress has done so in the 1986 amendments to CERCLA.

The majority invokes the "American rule" upheld in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S. Ct. 1612, 1616, 44 L. Ed. 2d 141 (1975), and *Runyon v. McCrary*, 427 U.S. 160, 182-86, 96 S. Ct. 2586, 2600-02, 49 L. Ed. 2d 415 (1976), but that is a rule requiring each party to bear its own attorneys' fees when Congress has not otherwise declared its intent. In *Alyeska*, the statute in issue said nothing remotely touching upon fees; the Court rejected the proposition that fee awards should follow from the fact that Congress had authorized private lawsuits. *Alyeska*, 421 U.S. at 263, 95 S. Ct. at 1624. In *Runyon*, the governing statute merely authorized the federal courts to apply the common law when federal law failed "to furnish suitable remedies." *Runyon*, 427 U.S. at 184, 96 S. Ct. at 2601. *Alyeska* and *Runyon* provide the rule when Congress has not indicated an intent; those two cases should not be

construed to create a presumption against the award of fees that Congress can only overcome by the use of particular language.

I would give the natural contextual meaning to "costs" of "enforcement activities" and hold that those terms authorize the recovery of Stanton Road's attorneys' fees. In so doing, I would avoid the frustration of Congress's purpose of stimulating private cleanup efforts, and would also avoid an unnecessary conflict between circuits.

Escrow Fund

I find in the record no hint that the defendants objected to the creation of an escrow fund from which disbursements would be made as future cleanup costs were incurred. Indeed, the statements of both sides in district court indicated that they contemplated the establishment of some such fund. I would not now entertain an objection raised by defendants that was not presented to the district court.

It is true, as the majority opinion states, that we may consider issues raised for the first time on appeal "if the issue is one of law *and the pertinent record has been fully developed.*" *United States v. Gabriel*, 625 F.2d 830, 832 (9th Cir. 1980) (emphasis added). In my view, the record in this case is anything but fully developed on the question of the propriety of an escrow fund to cover future cleanup costs. Because the parties did not dispute the issue, there is no evidence regarding alternatives to such a fund, or the necessity for it in this case, or the alternative methods of ensuring that disbursements will be for necessary expenses only and will be "consistent with the national contingency plan" as required by section 107(a)(4)(B).

The majority has ruled that the district court erred in setting up the escrow fund because that required the defendants to pay damages for cleanup costs that Stanton Road had not yet incurred. But the disbursements were not to be made from the escrow fund until after the costs had been incurred. The majority apparently concludes

nonetheless that such an arrangement runs afoul of our holding in *Dant & Russell v. Burlington N. R.R. Co.*, 951 F.2d 246 (9th Cir. 1991), that plaintiffs must "actually incur response costs before they can recover them." *Id.* at 250. But *Dant & Russell* involved a flat award for future response costs. In holding that costs could not be recovered before they were incurred, we said:

> This case provides no occasion for defining what "incurred" means--only what it does not mean. Here, we are presented with nothing but bare assertions by BN that BN will perform future cleanup. These assertions do not amount to response costs "incurred" under § 9607(a)(4)(B).

Id. Here the escrow arrangement was based on far more than mere assertions of intended cleanup. The arrangement may be sufficiently concrete to satisfy the definition of costs "incurred." If it is not, the fault is with the defendants. Had they raised an objection to the escrow arrangement in district court, the escrow conditions could have been modified to require the kind of commitment to cleanup that might well be deemed to render the costs "incurred."

CERCLA is relatively new legislation, and our experience with it is still unfolding. Escrow arrangements to cover cleanup costs may prove to be a useful device in effectuating Congress's purposes, particularly when there is a question concerning the continued solvency of the liable polluter. I would not hastily rule out the use of such a tool unless I were convinced that the statute forbade it. I can reach no such conclusion on this scanty record. The issue, I submit, should have been left for a later day, when the parties have properly framed it. Here it has been waived; I would affirm the district court.

APPENDIX D

STANTON ROAD ASSOCIATES, a California partnership, Plaintiff,

v.

LOHREY ENTERPRISES, INC., ELECTRONIC VALET SYSTEMS, INC., DAVID LOHREY and NATHAN PANG, Defendants.

No. C 89 0947 SC

United States District Court for the Northern District of California.

1991 U.S. Dist. LEXIS 5630

April 15, 1991, Decided.

April 15, 1991, Filed.

On Appeal to Ninth Circuit.

Before: SAMUEL CONTI, United States District Judge.

This case came on for hearing without a jury April 2, 3, 4, and 8, 1991 before the Honorable Samuel Conti. Steven Hock and Greg Block appeared for plaintiff Stanton Road Associates; Susan Watson and Richard Nosky Jr. appeared for defendants Lohrey Enterprises, Inc., Electronic Valet Systems, Inc., David Lohrey and Nathan Pang. The suit involves a private action under state and federal law for damages, cleanup and other relief by an owner of commercial property who contends that dry cleaning operations on adjoining property resulted in illegal contamination of its property with hazardous wastes. The court having considered all the evidence before it at trial and the briefs and argument of counsel, makes the following findings of fact and conclusions of law.

I.

FINDINGS OF FACT

1. Plaintiff in this action, Stanton Road Associates ("Stanton"), is a California limited partnership formed in 1987. George Sheldon ("Sheldon"), an individual, has been the general partner of Stanton since its formation, and Sheldon's two children have been the limited partners. Prior to 1987, Sheldon was employed by the Curley Bates Company ("Curley Bates"), a sporting goods firm of which he became president and sole shareholder in 1976. At all relevant times, Stanton was the owner of property located at 860 Stanton Road, Burlingame, California ("Stanton Road Property").

2. Defendants in this action are Lohrey Enterprises, Inc. ("Lohrey Enterprises"), a California corporation; Electronic Valet Systems, Inc. ("Electronic Valet"), a California corporation; David Lohrey ("Lohrey"), an individual; and Nathan Pang ("Pang"), an individual.

3. Prior to June 9, 1987, Electronic Valet's corporate name was West Coast Valet Services, Inc. ("West Coast Valet"). At all relevant times, Electronic Valet, formerly West Coast Valet, occupied property at 855 and 857 Malcolm Road, Burlingame, California ("Malcolm Road Property").

4. Lohrey Enterprises was formed as a partnership in 1971 and was incorporated in 1975. As of 1982, Lohrey and his brother, Arthur Lohrey, were the shareholders of Lohrey Enterprises. In 1986, Lohrey acquired Arthur Lohrey's shares of Lohrey Enterprises and became the chairman, president, and sole shareholder of Lohrey Enterprises.

5. The two contiguous parcels of real property involved in this action, the Malcolm Road Property and the Stanton Road Property, are separated by approximately twenty feet of earth ("the Alley") which is unimproved except for certain utility lines and boxes. The property line between the properties runs down the

middle of the Alley. At all relevant times, the rear door of the building on the Malcolm Road Property opened out on the Alley.

6. Curley Bates owned the Stanton Road Property from 1962 to 1987, when Stanton acquired it. On January 31, 1990, Stanton sold the property to Alberto Manuel and Marta Rodriguez and Stephen J. Russell and Stephanie J. Morgan-Russell, who have owned the property since.

7. As of June 1, 1982, the Bank of California owned the Malcolm Road Property as the trustee/lessor. In December 1986, Lohrey and his wife, Elizabeth Danel, became the owners of the Malcolm Road property, and have owned it since.

8. The building on the 855 portion of the Malcolm Road Property has been used for a commercial dry cleaning operation from 1982 to present, first by West Coast/Electronic Valet until 1988, and then by a third party from 1988 to present.

9. Lohrey, Lohrey Enterprises and Pang actively participated in establishing the West Coast Valet commercial dry cleaning business: Lohrey, acting as an individual and on behalf of Lohrey Enterprises, prepared business plans and financial projections and procured a line of credit; Lohrey Enterprises leased the Malcolm Road Property for West Coast Valet's business and guaranteed a line of credit for West Coast Valet; and Pang prepared its business and financial plans, researched the market, solicited business, located a site, and hired employees.

10. Lohrey, Lohrey's brother Arthur Lohrey, and Pang initially owned West Coast Valet in the following capacities, respectively: 37.5%, 37.5%, and 25%. The three had an understanding that over time, they would each own 33.3%. In 1986, Lohrey acquired Arthur Lohrey's ownership interest.

11. From June 9, 1986 through June 8, 1987, Pang and Lohrey considered Pang to be "vice president" of West Coast Valet. Lohrey and his brother interchangeably considered themselves "president" of West Coast Valet.

12. From June 9, 1982 through June 9, 1987, Lohrey and Pang were actively involved, through regular meetings, in managing the business affairs of West Coast Valet.

13. A July 1987 private placement memorandum distributed to potential investors in Electronic Valet stated "in 1982 Lohrey Enterprises, Inc. founded West Coast Valet Services, Inc. . . . " West Coast Valet was also identified and held out as a "subsidiary" of Lohrey Enterprises, and as a "Lohrey Enterprises" Company.

14. Lohrey was the sole incorporator of West Coast Valet in June of 1982. From June 1982 through June 8, 1987, West Coast Valet had no board of directors, no minutes of board meetings, no bylaws, no issued stock, and no elected or appointed officers. Neither Lohrey nor Pang paid any capital into or invested any money in the business of West Coast Valet in exchange for their ownership interests. Neither of the two, nor any other purported owner of West Coast Valet, paid capital into, invested in, or risked their own money or assets in connection with West Coast Valet during the period from 1982 to 1987.

15. The funds necessary to begin operating the West Coast Valet commercial dry cleaning business were provided by a line of credit from Bank of the West, procured by Lohrey and guaranteed by Lohrey Enterprises. In consideration for the line of credit the Bank of the West received, among other things, a security interest in any unencumbered assets of the West Coast Valet commercial dry cleaning operations.

16. West Coast Valet opened for business in 1982 and operated at a loss for several months. Thereafter it began to profit, and continued to do so until it was sold in 1988. At least half of such profits were regularly distributed to Lohrey and Pang as owners of West Coast Valet as "dividends" and converted to their personal use, even though no stock had been issued.

17. On June 30, 1987, West Coast Valet changed its name to Electronic Valet. Its board of directors (Lohrey, Lohrey's wife, and Pang) adopted by-laws and elected officers. Lohrey was elected

chairman of the board, president and chief executive officer; Pang was elected vice president.

18. Soon thereafter Lohrey combined (in his words, "merged") the business of Electronic Valet with the business of West Coast Laundry Machinery, Inc. Lohrey planned to offer preferred stock in Electronic Valet to investors to market certain automated valet service units. However, the offering ultimately failed to attract investors on terms suitable to Lohrey and Pang, and the marketing plan was wound down.

19. In August 1987, Electronic Valet issued to Lohrey and his wife 3,750,000 shares of common stock, for total consideration of one dollar.

20. As of June 30, 1986, West Coast Valet had retained earnings of $146,128 and net income from the past year of $21,952. As of June 30, 1987, Electronic Valet was projected to have an accumulated deficit of $72,996, capital from the sale of common stock of $1.00 and a net loss for the past year of $219,124. Electronic Valet was projected to have loans of $441,674, obligations under capital leases of $503,849 and payables of $226,354.

21. On July 14, 1988, Electronic Valet's commercial dry cleaning operation was sold to a third party for cash, and the proceeds were distributed to creditors, to Lohrey Enterprises for purported "debts," and to Lohrey and his wife individually.

22. From 1982 through 1988, perchlorethelene ("perc"), a toxic chemical and "hazardous substance" under CERCLA, was used continuously in the dry cleaning operation on the Malcolm Road Property.

23. In 1982, both Lohrey and Pang knew that perc was a volatile and flammable liquid, and that it had a unique, strong odor. Pang also knew that perc was delivered in a vehicle similar to a gasoline truck, and he observed that perc was destroying plastic piping in the dry cleaning equipment.

24. During the period from 1982 to 1985, a reasonable person having knowledge of the facts described in the preceding paragraph should and would have known that perc was toxic and dangerous if released into the environment.

25. On three occasions beginning in 1982, Pang observed perc spilling from the drycleaning systems and flowing out the door into the Alley due to the slant of the floor. The perc was left in the Alley to dry.

26. In 1983 Pang was informed of at least three more such incidents by West Coast Valet Manager Robert Curtis. Mr. Pang recalls that the spills continued through 1985. Additional disposal of perc to the Alley occurred when sludge was dumped out the back door from the "cooker."

27. Perc has been listed as a hazardous waste since 1979 by the state, and since 1980 by the EPA.

28. In 1985 the City of Burlingame notified West Coast Valet to stop dumping sludge into the Alley, and cited it for disposing of perc in the public sewer system.

29. In 1985 Pang received materials informing him that perc is a hazardous substance. On August 3, 1988 Pang received a Cease and Desist Order from attorneys for Stanton. After receiving this order, Electronic Valet notified the Regional Water Quality Control Board that it had not discharged hazardous waste at any time.

30. West Coast Valet's disposal of perc into unlined soils in the Alley violates federal and state statutes. Its failure to notify regulatory authorities of the perc spills violates federal law.

31. On December 4, 1989, Dirk Jensen of the San Mateo County Health Department notified Lohrey that he was in violation of California Health and Safety Code Sections 25254 and 25189.5. On March 13, 1990, he notified Lohrey a second time of the violations and directed that Lohrey submit a corrective action plan to the county within ten days.

32. To date, the county has not received a corrective action plan or any other reports from any of the named defendants. None of the defendants has taken any action to clean up the Stanton Road Property.

33. According to expert opinion, it is estimated that it would take about three years and would cost approximately $775,000 to clean up the Stanton Road Property to conform to government regulations regarding levels of perc. The $775,000 figure includes a contingency factor of plus or minus 40%. That is, the cleanup could cost as little as 40% less than $775,000, or as much as 40% more than $775,000.

34. The minimum amount of funding available that would be necessary for an environmental firm to be willing to undertake the cleanup of the Stanton Road Property would be $1,100,000. There was no evidence presented as to any lesser amount acceptable to an environmental firm to do the cleanup.

35. From 1963 to 1986, Curley Bates occupied the Stanton Road Property. In 1986 Easton Development Corporation ("Easton") began occupying the premises pursuant to a lease agreement with Curley Bates dated December 2, 1985, under which Easton would lease the premises through September 1, 1988. Under the lease agreement, Curley Bates could exercise a "put" right (require Easton to purchase the property) by giving Easton notice of exercise of the right on September 1, 1988.

36. Pursuant to the lease agreement, on August 1, 1988 Easton provided Stanton with an appraisal of the fair market value of the Stanton Road Property at $1,340,000. Attached to the appraisal was the August 1987 report of Blymer & Sons Engineering Company concerning the presence of hazardous chemicals on the property. This was Sheldon's first notice of contamination of the Stanton Road Property.

37. Upon learning of the contamination, Stanton retained the environmental consulting firm of Harding Lawson Associates ("HLA") to investigate. HLA reported that the Stanton Road

property was contaminated with perc from the West Coast Valet drycleaning operation.

38. In August 1988 Sheldon and Easton agreed to have the Stanton Road Property appraised a third time, and to have the appraisal made under the assumption that the property was not contaminated. They agreed to extend the purchase date under the agreement from September 1, 1988 to October 1, 1988 in order to get the third appraisal and investigate the contamination. Easton communicated that it would not proceed with the purchase of a contaminated property.

39. On September 9, 1988, the third appraisal valued the property at $1,420,000 in an uncontaminated state. Stanton was prepared to proceed with the sale at this price. However, Easton confirmed in a May, 1989 letter that it would not proceed with the purchase due to the contamination.

40. But for the contamination, Stanton would have made a cash sale to Easton for $1,420,000.

41. Thereafter Stanton made all reasonable efforts to mitigate its damages from the lost sale, incurring various expenses in those efforts. In 1989, Stanton rented a portion of the property for a total of $3,000. On January 31, 1990, Stanton sold the Stanton Road Property to Alberto Manuel and Marta Rodriguez, and Stephen J. Russell and Stephanie J. Morgan-Russell (collectively, "Alrod") for a purchase price of $1,425,000.

42. The terms of the sale to Alrod included: Stanton's agreement to clean up the property to comply with government standards within three years of January 31, 1990; seller financing by Stanton by taking back a note from the buyers for a face amount of $1,111,500, secured by a first deed of trust on the Stanton Road Property; and Stanton's indemnity of the buyers for expenditures and liability they might incur because of the contamination.

43. As a direct and proximate result of defendants' conduct and the contamination of the Stanton Road Property, Stanton has suffered the damages listed below:

a. Stanton lost the use of the $1,420,000 cash it would have gotten from the sale to Easton for the period from September 1, 1988 through January 31, 1990. Deposited, this amount would have earned interest at 9.25% compounded daily, for a total return to Stanton of $199,159.

b. Also between September 1, 1988 and January 31, 1990: Stanton paid real property taxes on the Stanton Road Property of $23,665; it paid $7,069 for insurance and maintenance costs on the property; it paid $1,000 in real estate commission on the 1989 rental described above; it paid $2,500 to repair the roof of the building on the property; and it paid a real estate brokerage commission of $85,500 in connection with the sale to Alrod.

c. To date, Stanton has paid HLA $77,374 for its environmental consulting work on the property.

d. Stanton, through its general partner Sheldon, has suffered annoyance and inconvenience. $75,000 is reasonably necessary to compensate for this damage. This amount includes any difference in the sale price of the Stanton Road Property due to appreciation in the real estate market.

e. In responding to the contamination, Stanton has incurred attorney fees and costs.

II.

CONCLUSIONS OF LAW

1. This court has jurisdiction over the subject matter of this action pursuant to § 113(b) of CERCLA (42 U.S.C. § 9613(a)), 28 U.S.C. § 1331, and jurisdiction pendent thereto.

2. Since the release and wrongful acts took place in San Mateo County, venue lies in this court pursuant to 28 U.S.C. § 1391(b) and 42 U.S.C. § 9613(b).

3. Defendants are liable for the recovery of response costs pursuant to 42 U.S.C. § 9607(a); Stanton is entitled to a declaration that defendants are liable for all future response costs and for costs incurred for cleanup, as required by Stanton's contract with the present owners of the Stanton Road Property; defendants trespassed onto Stanton's property; defendants were negligent in causing the contamination; defendants created a nuisance; and defendants are liable for indemnification and contribution.

4. Perc is a "hazardous substance" under 42 U.S.C. § 9601(14), 40 C.F.R. § 302.4 and 40 C.F.R. § 261.31.

5. The defendants released contaminants into the Alley and surrounding area within the meaning of "release" in 42 U.S.C. § 9601(22).

6. An award of attorney fees as part of "enforcement activities" related to response in a private action under CERCLA is justified by the language of the statute and is consistent with CERCLA's legislative intent. CERCLA § 101(25), 42 U.S.C. § 9601(25); *see General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422; *Pease & Curren Refining, Inc. v. Spectrolab, Inc.*, 744 F. Supp. 945 (C.D. Cal. 1990).

7. Stanton's expenditures in investigating, monitoring, and assessing the soils, waters and contiguous environment at the Alley, and attorneys' fees incurred for necessary response costs consistent with the national recovery plan, are recoverable as costs of response pursuant to the relevant definition sections of CERCLA, 42 U.S.C. § 9601(23), (24), and (25).

8. The court has reviewed Stanton's request for attorneys' fees together with its documentation and the defendants' response thereto. The court concludes that attorney fees are proper only with reference to costs of "response" under CERCLA, and that 46% of

the attorneys' fees requested are attributable to response costs. Therefore, the court finds that attorney fees in the amount of $126,197.78 are reasonable "response costs" payable to Stanton.

9. Defendant Lohrey is a liable party pursuant to § 107(a) of CERCLA as a current owner of contaminated property, and as owner at the time of contamination. *New York v. Shore Realty Corp.*, 759 F.2d 1032 (2d Cir. 1985).

10. Defendants Lohrey, Lohrey Enterprises, Electronic Valet and Pang are strictly liable under § 107(a) as owners and/or operators of the facility during all relevant times.

11. Pursuant to CERCLA all defendants are liable parties. Their acts regarding hazardous substances have already occurred. The future costs of response are necessary and are not unlikely, remote, or speculative. Accordingly, declaratory relief is appropriate at this time in order that Stanton may ascertain its rights against defendants. 42 U.S.C. § 9613(g)(2); 28 U.S.C. § 2201(a).

12. Therefore, plaintiff Stanton is entitled to a declaration that all defendants are jointly and severally liable under CERCLA for all future response costs necessary to address the release and threatened release of hazardous substances from or occasioned by perc and other contaminants generated by defendants at the Stanton and Malcolm Road Properties.

13. In order to ensure payment by defendants of all future response costs necessary to address the contamination of the Stanton Road Property, defendants, jointly and severally, shall pay to Stanton the sum of one million one hundred thousand dollars ($1,100,000). Stanton shall deposit said sum in an interest bearing escrow trust account ("Cleanup Escrow") established to implement the remediation of 860 Stanton Road as expeditiously as possible by the environmental consulting firm PES Environmental, Inc. ("PES"). Defendants shall have no control over the Cleanup Escrow fund, other than to monitor the expenditures therefrom. Payments from the Cleanup Escrow fund for cleanup services rendered shall be paid out as invoices are received and work in reviewed and approved by PES

principals. Copies of the said invoices shall be provided to a party to be designated jointly by all defendants.

14. The Cleanup Escrow will terminate upon written certification from PES that the 860 Stanton Road Property has been remediated in accordance with all relevant regulatory cleanup levels and requirements.

15. If unused funds remain in the Cleanup Escrow at the time of termination, such funds will be distributed as follows:

a. First all unused funds shall be paid out to Stanton in order to satisfy any money damages awarded to Stanton in this judgment that remain unpaid as of the date of termination of the escrow. In the event excess Cleanup Escrow funds remain subsequent to satisfying any unpaid judgment, such funds shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow;

b. In the event all monetary damages awarded Stanton have been satisfied in full upon termination of the Cleanup Escrow, all remaining sums shall be paid out to defendants on a pro rata basis according to the percentage that each defendant paid funds into the original Cleanup Escrow.

16. Trespass occurs when a party unlawfully interferes with another's possession or enjoyment of property. *Staples v. Hoefke*, 189 Cal. App. 3d 1397 (1990). By spilling perc on Stanton's property, and by causing the migration of perc from defendant's property to Stanton's property without Stanton's consent, defendants unlawfully interfered with Stanton's property and thereby committed trespass.

17. For the trespass, defendants are liable for the consequential damages and for the annoyance and inconvenience caused by the trespass. *Kornoff v. Kingsburg Cotton Oil Co.*, 45 C.2d 265, 272 (1955).

18. Three elements are necessary to establish negligence: 1) defendants' legal duty to use due care; 2) defendants' breach of that duty; 3) proximate causation of plaintiff's damages. *Nally v. Grace Community Church*, 47 C.3d 278 (1988).

19. Defendants had a duty to use due care when dealing with contaminants to avoid causing injury to Stanton, and to remedy any injury they caused by contamination.

20. Defendants failed to use ordinary care in the disposal of perc in light of their possession of information that would put a reasonable person on notice that it should not be discharged into the environment. They are also charged as a matter of law with an awareness of laws and regulations dealing with hazardous waste and chemicals. *Liquid Chemical Corp. v. Department of Health Services*, 227 Cal. App. 3d 384, 403 (1991).

21. Defendants breached their duty by using and disposing of perc in the Alley during the course of their operations as an industrial scale dry cleaning operation. Defendants further breached their duty of due care by failing to remedy the injury to plaintiff caused by the release of contaminants in the Alley.

22. As a direct and proximate result of defendants' negligence, Stanton has incurred damages for which defendants are liable.

23. Nuisance requires proof that the defendants caused an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of property. Cal. Civ. Code § 3479; *Pinole Point Properties, Inc. v. Bethlehem Steel Corp.*, 596 F. Supp. 283 (N.D. Cal. 1984); *Wolford v. Thomas*, 190 Cal. App. 3d 347 (1987).

24. Defendants' acts and omissions regarding release of the contaminants into the soil and groundwater in the Alley interfered with Stanton's free use and comfortable enjoyment of the Stanton Road property. As a direct and proximate result of defendants' acts and omissions, Stanton has incurred damages for which defendants are liable under the law of nuisance.

25. Notwithstanding compliance with statutory requirements for the creation and operation of a corporation, the corporate entity may be disregarded to assure a just and equitable result. *See* Ballantine, *California Corporations Laws*, § 295 *et seq.* at pp. 14-32 (4th Ed. 1990). For the corporate entity to be disregarded, the circumstances of the particular case must be such that 1) there is such a unity of interest and ownership that the separate personalities of the corporation and the individual no longer exist, and 2) if the acts are treated as those of the corporation alone, an inequitable result will follow. *Automotriz del Golfo de California v. Resnick*, 47 Cal. 3d 792 (1957). Two principal areas of inquiry are the extent to which a corporation is adequately capitalized throughout its operations to meet liabilities and the degree to which corporate formalities are followed. *Id.*

26. Defendants' failure to: adequately capitalize West Coast Valet/Electronic Valet; issue stock; maintain minutes and adequate records; hold board meetings; and observe corporate formalities constitutes such a unity of interest of the corporation and the individuals that the separate personalities of the corporation and individuals no longer exist.

27. Unless the corporate entity is disregarded and the individual defendants are held liable, injustice will result in that an innocent neighbor will have to bear the cost of cleanup and other damages.

28. Based on the evidence in this case, defendants, each and every one of them, are jointly and severally liable to Stanton for all damages incurred by Stanton in connection with the contamination of Stanton's property, despite their acting through a corporation.

29. The measure of damages for tortious injury to property is the amount which will compensate for all the detriment proximately caused by the tortious act, whether it could have been anticipated or not. Cal. Civ. Code § 3333; *Armitage v. Decker*, 218 Cal. App. 3d 887 (1990).

30. Based on the foregoing facts, Stanton has incurred damages as follows:

a.	Loss of use of $1,420,000 from September 1, 1988 (lost Easton sale) to January 31, 1990 (Alrod sale) (518 days at 9.25%)	$199,159
b.	Out-of-pocket expenses for carrying of property from September 1, 1988 to January 31, 1990	
	Real property taxes of $23,665 less rent received on short-term lease of $3,000	$20,665
	Insurance and maintenance	$7,101
	Roof repair	$2,500
c.	Real estate commission on January 31, 1990 Alrod sale which would not have been incurred for lost Easton sale	$85,500
d.	Annoyance and inconvenience (trespass)	$75,000
e.	Environmental response costs	
	Liquidated damages	$70,174
	Additional amount testified to at trial	$7,200
f.	Attorney fees	$126,198
g.	Cleanup costs to be placed in escrow	$1,100,000
h.	Costs of suit	

IT IS SO ORDERED.

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

KEY TRONIC CORPORATION, a Washington Corporation, Plaintiff-Appellee, v. UNITED STATES OF AMERICA; UNITED STATES DEPARTMENT OF THE AIR FORCE; DONALD B. RICE, Secretary of the United States Air Force, in his official capacity, Defendants-Appellants.	NO. 91-36021 D.C. No. CV-89-694-JLQ ORDER

Before: SNEED, ALARCON, and CANBY, Circuit Judges.

Judge Sneed and Judge Alarcon vote to deny the petition for a rehearing and recommend rejection of the suggestion for rehearing en banc. Judge Canby would grant the petition for rehearing and grant the suggestion for rehearing en banc.

The full court was advised of the suggestion for rehearing en banc. An active judge requested a vote on whether to rehear the matter en banc. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

No. 93-376

Supreme Court, U.S.
FILED
SEP 30 1993
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,

VS.

UNITED STATES et al.,
Respondents.

STANTON ROAD ASSOCIATES,
Petitioner,

VS.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC.,
DAVID LOHREY and NATHAN PANG,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

ROBERT H. BUNZEL
(Counsel of Record)
HOWARD L. PEARLMAN
BARTKO, TARRANT & MILLER
A Professional Corporation
900 Front Street, Suite 300
San Francisco, CA 94111
(415) 956-1900
Attorneys for Respondents Lohrey Enterprises, Inc., Electronic Valet Systems, Inc., David Lohrey and Nathan Pang

BOWNE OF SAN FRANCISCO, INC. • 343 SANSOME ST. • S.F., CA 94104 • (415) 362-2300

QUESTION PRESENTED

Whether certiorari should be granted so as to determine whether the federal Superfund statute contains explicit congressional authorization for the recovery of attorneys' fees in private party cost recovery actions brought thereunder.

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DAVID LOHREY and NATHAN PANG,
Respondents.

On Petition for a Writ Of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

Respondents Lohrey Enterprises, Inc., Electronic Valet Systems, Inc.,[1] David Lohrey and Nathan Pang respectfully request that this Court deny the petition for writ of certiorari, seeking review of the Ninth Circuit's opinion in *Stanton Road Associates v. Lohrey Enterprises, Inc., et al.* That opinion is reported at 984 F.2d 1015 (9th Cir. 1993).

[1] Lohrey Enterprises, Inc. and Electronic Valet Systems, Inc. have no parent companies and no subsidiaries.

STATUTE INVOLVED

The Comprehensive Environmental Response, Compensation, and Liability Act of 1980 ("CERCLA"), as amended by the Superfund Amendments and Reauthorization Act of 1986 ("SARA"), 42 U.S.C. §§ 9601 *et seq.*, commonly referred to as "Superfund." Petitioner claims that Congress must have explicitly authorized private party recovery of attorneys' fees when it defined the word "response" in CERCLA section 101(25), 42 U.S.C. § 9601(25), to include "enforcement activities," and authorized private parties in CERCLA section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B), to recover "necessary costs of response."

STATEMENT OF THE CASE

Respondents adopt and incorporate herein the Ninth Circuit's statement of facts set forth in Section I of its opinion in *Stanton Road Associates*. 984 F.2d at 1016-1017.

On appeal, the Ninth Circuit reversed the district court's award of attorneys' fees to Stanton Road Associates under CERCLA, holding that the words "enforcement activities" as used in CERCLA's definition of the word "response" do not constitute explicit congressional authorization for the recovery of attorneys' fees. *Id.* at 1019. In so holding, the Ninth Circuit applied the American Rule as articulated in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975) and *Runyon v. McCrary*, 427 U.S. 160, 185, 96 S.Ct. 2586, 2602, 49 L.Ed.2d 415 (1976) (recovery of statutory attorneys' fees requires "explicit congressional authorization"). *See* 984 F.2d at 1018-1019. Noting that other provisions of CERCLA explicitly authorize recovery of attorneys' fees (e.g., 42 U.S.C. §§ 9604(b) and 9659(f)), the Ninth Circuit cautioned:

> If Congress determines that an exception to the American Rule is appropriate in private response actions, it will do so in explicit terms as it has previously done in other parts of CERCLA.

984 F.2d at 1020. Congress has the opportunity to make that determination in the ongoing Superfund reauthorization hearings.

REASON FOR DENYING THE WRIT

A. CONGRESS HAS THE OPPORTUNITY IN THE ONGOING SUPERFUND REAUTHORIZATION HEARINGS TO ELIMINATE INTERCIRCUIT CONFLICT BY CLARIFYING ITS INTENTION REGARDING PRIVATE ATTORNEYS' FEES.

In *Braxton v. U.S.*, ___ U.S. ___, 111 S.Ct. 1854, 114 L.Ed.2d 385 (1991), this Court recently chose not to resolve an intercircuit conflict where it determined Congress had authorized another body to resolve such conflicts. Similar discretion is appropriate here.

The petition in *Braxton* asked the Court, among other things, to resolve a circuit conflict over the interpretation of a provision of the U.S. Sentencing Commission's Guidelines Manual. 111 S.Ct. at 1857. After certiorari had been granted, the Commission requested public comment on the question presented in the first part of the certiorari petition, pursuant to its statutory duty to review and revise the Guidelines. *Id.* The Court concluded that by granting such authority to the Commission, Congress contemplated that the Commission would make clarifying revisions to the Guidelines necessary to resolve conflicting judicial decisions. *Id.* at 1858. "This congressional expectation alone," Justice Scalia wrote, "might induce us to be more restrained and circumspect in using our certiorari power as the primary means of resolving [circuit] conflicts . . . ."[2] *Id.* Because the Commission had already "undertaken a proceeding that will eliminate [the] circuit conflict" (id.), the Court chose not to resolve the conflict.

The reasoning in *Braxton* applies here. A circuit conflict exists as to whether CERCLA authorizes the recovery of attorneys' fees in private party cost recovery actions. This Court has long

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[2]Justice Scalia further observed:

> [W]e are not the sole body that could eliminate such [circuit] conflicts . . . . Obviously, Congress itself can eliminate a conflict concerning a statutory provision by making a clarifying amendment to the statute . . . .

Id. at 1857.

recognized that attorneys' fees are only recoverable under a federal statute if Congress explicitly authorizes them. *Alyeska, supra*, 421 U.S. at 269, 95 S.Ct. at 1627; *Runyon, supra*, 427 U.S. at 185, 96 S.Ct. at 2601. Congress, and not this Court, is best able to resolve the conflict by making a clarifying amendment to CERCLA. Funding for CERCLA will expire in 1994 (*see* 42 U.S.C. § 9611(a)), and CERCLA reauthorization hearings have already begun. Freeling, *Recovery of Attorneys Fees in CERCLA Private-Party Cost Recovery Actions: Striking a Balance*, 23 Envtl.L.Rep. 10477, 10480 & n. 35 (August 1993). As in *Braxton*, the circuit conflict can be eliminated in ongoing nonjudicial proceedings.

Rather than unnecessarily expend judicial resources now in an effort to determine Congress' intent, Congress should first be given the opportunity to address the issue. Denial of the writ is thus within the Court's sound discretion consistent with its ruling in *Braxton* and the interests of judicial economy.

B. THE NINTH CIRCUIT'S OPINION CORRECTLY APPLIES THIS COURT'S CONTROLLING PRECEDENT.

The manifestly correct ruling of the Ninth Circuit that the words "enforcement activities," as used in CERCLA, fail to explicitly authorize recovery of attorneys' fees in private party cost recovery actions, does not require this Court's plenary review.

It is a fundamental principle of American jurisprudence—the "American Rule"—that "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Runyon, supra*, 427 U.S. at 185; *Alyeska, supra*, 421 U.S. at 269. As the Ninth Circuit observed, "Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule." 984 F.2d at 1019. Indeed, it did so in at least two other provisions of CERCLA. *See* CERCLA § 310(f), 42 U.S.C. § 9659(f) (authorizing courts to award "costs of litigation (including reasonable attorney . . . fees)" to prevailing parties in citizens suits) *and* CERCLA § 110(c), 42 U.S.C. § 9610(c) (authorizing awards of "all costs and expenses (including the attorney's fees)" to whistleblowers).

Following *Alyeska*, and based on Congress' explicit provision for recovery of attorneys' fees elsewhere in CERCLA, the Ninth Circuit properly concluded that the phrase "enforcement activities" as part of the definition of the word "response" in CERCLA's definitional section does not *explicitly* authorize the recovery of attorneys' fees in private cost recovery actions.[3] 984 F.2d at 1019. As the Ninth Circuit observed, the term "enforcement activities" is "outside even the most exhaustive lexicon of customary fee shifting language." *Id.* (citation omitted). Indeed, the Court noted the very existence of a controversy as to whether the term "enforcement activities" is sufficiently explicit itself demonstrates that it is not. *Id.*

Because the opinion of the Ninth Circuit correctly restates and applies the American Rule as articulated in *Alyeska*, review on certiorari is not warranted. *See Estelle v. Gamble*, 429 U.S. 97, 115 (1976) (Stevens, J. dissenting) ("[t]he Court seldom takes a case merely to reaffirm settled law"); *cf.* Rehnquist, *Oral Advocacy: A Disappearing Art*, 35 Mercer L. Rev. 1015, 1027 (1984) ("the most common reason members of our Court vote to grant certiorari is that they doubt the correctness of the decision of the lower court").

C. THE QUESTION PRESENTED DOES NOT RAISE AN IMPORTANT ISSUE OF FEDERAL LAW THAT IS RIPE FOR ADJUDICATION BY THIS COURT.

Congress has never equated compensating counsel with environmental protection. And yet, petitioner pleads that its writ raises a question of "national importance" because the recovery of

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[3] The Eighth Circuit's construction of "enforcement activities" as including attorneys' fees is based on judicial policymaking—unsupported by CERCLA's legislative history—that recovery of attorneys' fees is warranted to further CERCLA's goals. *See General Elec. v. Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 111 S.Ct. 1390 (1991). Such judicial legislation profoundly violates the American Rule. *See Alyeska, supra*, 421 U.S. at 260 (Congress has not "extended any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted").

attorneys' fees by private CERCLA parties allegedly promotes the cleanup of contaminated properties.[4] There is nothing in the language of CERCLA or its legislative history to support petitioner's policy pronouncement. *See In re Hemingway Transport, Inc.*, 993 F.2d 915, 934 (1st Cir. 1993) ("Congress did not consider, and SARA did not include, any attorney fee award amendment applicable to the private cost recovery provision").

To the contrary, there is evidence that the litigiousness fostered by the Superfund program is preventing the achievement of its goals. *See* Acton & Dixon, *Superfund and Transaction Costs: The Experience of Insurers and Very Large Industrial Firms* (RAND 1992), p. ix (CERCLA's "liability-based approach shrouds the program in litigiousness, slowing the pace of cleanups and creating steep transaction costs for private parties"); Freeling, *supra, Recovery of Attorneys Fees In CERCLA Private-Party Cost Recovery Actions: Striking a Balance*, 23 Envtl.L.Rep. at 10480 (August 1993) ("[p]arties seeking recovery from others might be more reasonable in their demands at the outset if their costs of litigation cannot be so easily shifted"). Indeed, EPA Administrator Carol M. Browner recently testified before Congress in the ongoing Superfund reauthorization hearings that "too much money is going to lawyers and not enough to cleanups." MacLachlan & Lavelle, *EPA Chief Decries Legal Bills*, Nat'l L.J., at 5 (May 24, 1993).

Such testimony and policy analysis as to the relationship between legal expenses and the goals of the Superfund program are properly raised in the legislative venue, not before this Court. Congress can amend CERCLA as it deems appropriate consistent

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[4] The Amicus Brief of Gloria Price in Support of the Joint Petition, dated September 17, 1993, most candidly discloses that the economic interest of plaintiff's *lawyers* is at stake. After lamenting that "[a]n unfortunate by-product of the adversarial system is that defendants with superior economic strength will often try to wear down a plaintiff financially," Amicus threatens that, absent the possibility of recovering attorneys' fees, "attorneys, such as [amicus' counsel], will not be willing to take cases such as the Price lawsuit [a private cost recovery action] on a contingency basis." Amicus Brief in Support of Joint Petition, at 9, 11.

with the legislative findings it ultimately makes. The narrow issue presented to this Court in the petition, however, does not legitimately encompass the policy concerns petitioner raises and has already been resolved in nearly 200 years of precedent establishing the American Rule. Accordingly, the current effort by certain interests within the legal profession to carve out an exception to that rule in the context of CERCLA private cost recovery actions is for Congress, not this Court, to debate. Having never explicitly provided for attorneys' fees, Congress has, in essence, once spoken—and has the opportunity to revisit the issue this Term.

CONCLUSION

For these reasons, respondents respectfully request that the petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit be denied.

RESPECTFULLY SUBMITTED this 30th day of September 1993.

ROBERT H. BUNZEL
(Counsel of Record)
HOWARD L. PEARLMAN
BARTKO, TARRANT & MILLER
A Professional Corporation
900 Front Street, Suite 300
San Francisco, CA 94111
(415) 956-1900
Attorneys for Respondents
Lohrey Enterprises, Inc.,
Electronic Valet Systems, Inc.,
David Lohrey and Nathan Pang

No. 93-376

Supreme Court, U.S.
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October Term, 1993

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Petitioner,

v.

UNITED STATES ET AL.,
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STANTON ROAD ASSOCIATES,
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v.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC.,
DAVID LOHREY AND NATHAN PANG,
Respondents.

SUPPLEMENT TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

James R. Moore
(Counsel of Record)
Benjamin S. Sharp
Mark W. Schneider
Kathryn L. Tucker
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888

Steven L. Hock
James C. Collins
Bruce J. Berrol
THELEN, MARRIN,
JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
(415) 392-6320

Attorneys for Petitioners

No. 93-376

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SUPPLEMENT TO JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Petitioners Key Tronic Corporation and Stanton Road Associates respectfully file this Supplement to the Petition pursuant to Rule 15.7. In their Joint Petition, filed September 7, 1993, Petitioners asserted as a reason for granting a Writ of Certiorari to the Ninth Circuit, the intercircuit conflict caused by decisions of the Sixth and Eighth Circuits allowing attorney's fees under CERCLA and

by those of the First and Ninth Circuits disallowing them. The Tenth Circuit has held that some attorneys' fees may be recoverable as response costs, but that fees directly related to litigation are not recoverable.

After the Joint Petition was filed, a Petition for a Writ of Certiorari to the Sixth Circuit was filed in this Court under the name of *Livingstone v. Donahey and Bogle* (No. 93-428). The United States is not a respondent in *Livingstone*. Accordingly, under the rules of this Court, *Livingstone* will be brought to the Court's attention before the Joint Petition where the United States is a party granted an extension of time until November 8 to respond. For that reason, the subsequently filed petition will be brought to the Court's attention prior to the Joint Petition.

Joint petitioners Key Tronic Corporation and Stanton Road Associates respectfully suggest that if the Court is inclined to review the issue of the recoverability of attorneys' fees in CERCLA cost recovery and contribution actions, the Joint Petition is a far better vehicle for consideration of that issue.

1. The Joint Petition raises the single issue of attorneys' fees in Superfund cases; *Livingstone v. Donahey and Bogle* raises additional issues.

2. The Joint Petition presents two sets of facts: one where the United States is a contributing party from which response costs are sought; the other where Stanton Road Associates is an innocent plaintiff that did not contribute to the Superfund site contamination but seeks response costs from those who contaminated its property. *Livingstone* involves a dispute between two parties both of which contributed to contamination of the site.

3. The Joint Petition involves a claim for different types of attorneys' fees, and a factual record that allocates the amount of fees to the various functions for which recovery is sought as response costs. The *Livingstone* petition does not draw distinctions among the various types of attorneys' fees claimed as response costs.

The Joint Petition presents factual records that should enable the Court to resolve this intercircuit conflict in a fashion that reduces the likelihood that a subsumed or pretermitted issue will be left unaddressed and become the subject of one or more subsequent petitions.

For the foregoing reasons, Petitioners respectfully request that the Court hold the Petition in *Livingstone v. Donahey and Bogle* (No. 93-428) and grant the Joint Petition of Key Tronic Corporation and Stanton Road Associates.

RESPECTFULLY SUBMITTED, this 25th day of October, 1993.

James R. Moore
(Counsel of Record)
Benjamin S. Sharp
Mark W. Schneider
Kathryn L. Tucker
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888

Steven L. Hock
James C. Collins
Bruce J. Berrol
THELEN, MARRIN,
JOHNSON & BRIDGES
Two Embarcadero Center
San Francisco, CA 94111
(415) 392-6320

Attorneys for Petitioners

(4)

No. 93-376

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In the Supreme Court of the United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION, PETITIONER

v.

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STANTON ROAD ASSOCIATES, PETITIONER

v.

LOHREY ENTERPRISES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENTS

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the provision in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), that allows a private party to recover the "costs of response" to pollution at designated sites, implicitly authorizes the recovery of attorney fees.

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BRIEF FOR THE FEDERAL RESPONDENTS

OPINIONS BELOW

The opinion of the court of appeals in the *Key Tronic* case (Pet. App. A1-A5) is reported at 984 F.2d 1025. The opinion of the court of appeals in the *Stanton Road* case (Pet. App. C1-C20) is reported at 984 F.2d 1015. The opinion of the district court in the *Key Tronic* case (Pet. App. B1-B15) is reported at 766 F. Supp. 865. The opinion

of the district court in the *Stanton Road* case (Pet. App. D1-D15) is unreported.

JURISDICTION

The judgments of the court of appeals in both cases were entered on January 28, 1993. Petitions for rehearing were denied in both cases on June 7, 1993. Pet. App. E1, F1. The petition for a writ of certiorari was filed on September 7, 1993 (a Tuesday after a Monday holiday). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The petition challenges two separate judgments of the Ninth Circuit, rendered in two separate cases consolidated for argument before the court of appeals. The United States is a party only in the *Key Tronic* case.

1. The *Stanton Road* case arises out of the effects of a dry cleaning plant owned and operated by the private respondents near property owned by petitioner Stanton Road Associates.[1] The private respondents allowed hazardous chemicals from the dry cleaning plant to contaminate Stanton Road's land. Pet. App. C2, D2-D6.

a. Stanton Road filed suit in the United States District Court for the Northern District of California, claiming that it was entitled under Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. 9607(a), to recover from the private respondents the costs of remedying the contamination, including attorney fees. After a bench trial, the district court ruled in favor of Stanton Road. Pet. App. D1-D15. The district court ordered the private respondents to pay Stanton Road $1,100,000 (to be deposited in an escrow account to cover the costs of remedying the contamination), together with $126,197.78 for attorney fees. *Id.* at D11.

[1] This brief refers to the respondents in the *Stanton Road* case as the private respondents.

b. A divided panel of the court of appeals reversed. Pet. App. C1-C20. Of relevance to the petition, the court concluded that the district court erred in awarding attorney fees. *Id.* at C4-C11. The court reviewed the applicable statutory language, which authorizes recovery of the "necessary costs of response" and defines "response" as "removal, remedy, and remedial action * * * includ[ing] enforcement activities related thereto." CERCLA §§ 107(a), 101(25), 42 U.S.C. 9607(a), 9601(25). Although the court of appeals acknowledged (Pet. App. C5) that the Eighth Circuit had allowed recovery of attorney fees as part of the "necessary costs of response" in *General Electric Company* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1421-1422 (1990), cert. denied, 499 U.S. 937 (1991), the court of appeals reached a different conclusion. The court noted the "American Rule" described by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975), under which "a prevailing party cannot recover attorneys' fees in the absence of congressional authority." Pet. App. C6. The court also considered (*id.* at C7) this Court's opinion in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which stated that attorney fees are not recoverable "absent explicit congressional authorization," *id.* at 185. Relying on those cases, the court concluded that the reference to "enforcement activities" in Section 101(25) of CERCLA was not sufficiently explicit to justify an award of attorney fees. Pet. App. C7.[2]

[2] Judge Canby dissented (Pet. App. C15-C20). On the attorney fee question, he argued that the panel's conclusion rendered the reference to "enforcement activities" in 42 U.S.C. 9601(25) superfluous, because attorney fees would be the main component of the costs of enforcement activities. Pet. App. C15-C19.

2. The *Key Tronic* case involves the Colbert Disposal Site in Spokane County, Washington. During the 1970's, the operator of that site disposed of hazardous waste it accepted from several parties, including petitioner Key Tronic as well as the United States Air Force. When it was discovered in 1980 that water wells near the site were contaminated, the Washington Department of Ecology (WDOE) and the federal Environmental Protection Agency (EPA) responded. Eventually, the government agencies entered into separate settlements with both Key Tronic and the Air Force. First, a settlement agreement with the Air Force required it to pay $1.45 million; in accordance with a provision for de minimis settlements in Section 122(g)(5) of CERCLA, 42 U.S.C. 9622(g)(5), the agreement provided that the Air Force would "not be liable for claims for contribution regarding matters addressed in the settlement." Second, a consent decree with Key Tronic required it to pay $4.2 million in cleanup costs. Pet. App. A2 & n.1, B2.

a. Petitioner Key Tronic Corporation filed suit against a variety of parties (including the United States) in the United States District Court for the Eastern District of Washington, seeking recovery under CERCLA for the costs it incurred pursuant to its settlement, as well as attorney fees and additional response costs that it claimed it had incurred independently. The court resolved a variety of dispositive motions in an opinion issued in 1991. Pet. App. B1-B15. Among other things, the district court held that the United States was liable for attorney fees as part of the necessary costs of response. *Id.* at B6-B13.

b. A divided panel of the court of appeals reversed. Pet. App. A1-A5. The relevant portion of the opinion relied entirely on the opinion in the *Stanton Road* case, summarized above. Pet. App. A4. Judge Canby dissented,

relying on his dissent in the *Stanton Road* case. Pet. App. A5; see note 2, *supra*.

3. The court of appeals denied petitions for rehearing and suggestions for rehearing en banc in both cases, with no recorded dissent other than that of Judge Canby. Pet. App. E1, F1.

ARGUMENT

Although we believe the decision of the court of appeals is correct, the question presented by the petition is an important one on which the courts of appeals are divided. Accordingly, the petition should be granted.

1. As the court of appeals recognized, the question before the Court must be resolved under the principle, consistently applied by this Court, that attorney fees are not recoverable in federal courts except as prescribed in an explicit authorization by Congress. See, *e.g.*, *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975); *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). The provisions of CERCLA relevant to these actions do not refer to attorney fees. Accordingly, petitioners were not entitled to recover attorney fees as part of the necessary costs of response to the covered environmental contamination.

The significance of the absence of any reference to attorney fees in the provisions applicable to this action is underscored by the presence of express references to attorney fees in other provisions of CERCLA. See, *e.g.*, 42 U.S.C. 9659(f) (prevailing parties in citizens suits may recover "costs of litigation (including reasonable attorney and expert witness fees)"); 42 U.S.C. 9610(c) (employee-whistleblowers may recover "all costs and expenses (including the attorney's fees)").[3] Accordingly, as

[3] See also 42 U.S.C. 9604(b) (authorizing federal government to "undertake such * * * legal * * * studies or investigations as

the Ninth Circuit explained, CERCLA is a statute where "Congress has repeatedly demonstrated that it knows how to express its intention to create an exception to the American Rule." Pet. App. C7. Thus, it also is a statute where it would be particularly inappropriate to interpret vague and indefinite language as implicitly authorizing the recovery of attorney fees.[4] Hence, the Ninth Circuit's conclusion that CERCLA does not authorize attorney fees in this context is correct.[5]

2. For several reasons, the question presented by the petition warrants review by the Court. First, the several courts of appeals that have considered the question have reached conflicting results. Like the Ninth Circuit in this case, the First Circuit has concluded that the absence of an explicit reference to attorney fees in the relevant provisions of CERCLA bars any recovery of attorney fees as part of the "necessary costs of response" under Section 107(a) of CERCLA.[6] On the other hand,

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[it] may deem necessary [and] * * * to recover the costs thereof").

[4] See, *e.g.*, *Russello* v. *United States*, 464 U.S. 16, 23 (1983) ("Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.") (brackets omitted).

[5] If the Court grants review in this case and (contrary to our submission) reverses the decision of the court of appeals on the attorney fee issue presented by the petition, it should remand the *Key Tronic* case to the Ninth Circuit for further proceedings on the question whether Key Tronic nevertheless would be barred from recovery because of its contribution to the contamination of the site. Because the court of appeals ruled in the government's favor on the question presented in the petition, it had no occasion to consider that argument. Pet. App. A4.

[6] *Juniper Development Group* v. *Kahn* (*In re Hemingway Transport, Inc.*), 993 F.2d 915, 934-935 (1993) ("Congress did not consider, and [CERCLA] did not include, any attorney fee award

the Sixth and Eighth Circuits have reached a contrary conclusion, reasoning that the "necessary costs of response" include attorney fees.[7] The Tenth Circuit has adopted an intermediate position, under which attorney fees that are not incurred in pursuing litigation are recoverable, although attorney fees incurred in the Section 107 action itself are not recoverable. *FMC Corporation* v. *Aero Industries, Inc.*, 998 F.2d 842, 848 (1993); see also *United States* v. *Hardage*, 982 F.2d 1436, 1447-1448 (1992) (stating same rule in dictum). The *FMC* panel reasoned that attorney fees that are not incurred in pursuing litigation are not covered by the *Alyeska* rule, and then determined that such fees would be "necessary costs of response" if they were "necessary to the containment and cleanup of hazardous releases" at the site.[8] 998 F.2d at 848.[9]

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amendment applicable to the private cost recovery provision in [CERCLA Section 107(a)]. We therefore conclude that Congress has elected not to authorize attorney fee awards in these actions."), cert. denied, No. 93-187 (Oct. 12, 1993). The petition for a writ of certiorari in No. 93-187 did not raise the question presented in this case.

[7] *Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir. 1993) ("The court can conceive of no surer method to defeat [Congress's purpose that Section 107 provide an incentive for parties to remedy hazardous waste contamination] than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs."), petition for cert. pending, No. 93-428; *General Electric Company* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1421-1422 (8th Cir. 1990) ("Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that [Section 107(a)] allows private parties to recover."), cert. denied, 499 U.S. 937 (1991).

[8] Petitioner Key Tronic argues (Pet. 12 n.14) that it would be entitled under the rule articulated by the Tenth Circuit to recover some of the attorney fees sought from the Air Force. In our view,

The practical consequences of the circuit conflict also counsel in favor of review by the Court at this time. The federal government and its various agencies often defend against suits, such as in the *Key Tronic* case at issue here, that seek to recover response costs based on the contributions of federal agencies to contamination at Superfund sites. The government is currently a defendant in 22 response cost actions pending in the Eighth Circuit and in 38 such cases in the Sixth Circuit. To the degree that plaintiffs have the opportunity to choose between forums, a continuing disparity in result between those courts and the First and Ninth Circuits could cause an increasing number of cases to be brought against the government in courts within those circuits.

any recovery of nonlitigation attorney fees permitted by Section 107 necessarily would be limited to fees "necessary to the containment and cleanup of hazardous releases," *FMC Corp.*, 998 F.2d at 848; we do not believe that any of the costs sought by petitioner Key Tronic fall within that category.

[9] The district courts in circuits that have not addressed the question at the appellate level also have reached conflicting results, with district courts disallowing fees in the Second and Third Circuits, see, *e.g.*, *Keystone Chemical Co.* v. *Mayer Pollock Steel Corporation*, No. Civ. A. 92-6000 (E.D. Pa. Apr. 7, 1993); *Alloy Briquetting Corporation* v. *Niagara Vest, Inc.*, 802 F. Supp. 943, 945-947 (W.D.N.Y. 1992); *Hatco Corporation* v. *W.R. Grace & Co.-Conn.*, 801 F. Supp. 1309, 1333 (D. N.J. 1992); *Leonard Partnership* v. *Town of Chenango*, 779 F. Supp. 223, 229-230 (N.D.N.Y. 1991); *New York* v. *SCA Services, Inc.*, 754 F. Supp. 995, 1000-1001 (S.D.N.Y. 1991); *T & E Industries, Inc.* v. *Safety Light Corp.*, 680 F. Supp. 696, 707-708 (D.N.J. 1988), and allowing fees in the Fourth and Seventh Circuits, see, *e.g.*, *HRW Systems, Inc.* v. *Washington Gas Light Company*, 823 F. Supp. 318, 345-346 (D. Md. 1993); *BTR Dunlop, Inc.* v. *Rockwell International Corporation*, No. 90 C 7414 (N.D. Ill. Feb. 16, 1993); *Chesapeake and Potomac Telephone Company* v. *Peck Iron & Metal Co.*, 814 F. Supp. 1281, 1282-1285 (E.D. Va. 1993), appeal pending, No. 93-1903 (4th Cir.).

Finally, we disagree with the argument of the private respondents (Br. in Opp. 4)[10] that the petition should be denied because CERCLA is currently before Congress for reconsideration and reauthorization. See CERCLA Section 111(p)(1), 42 U.S.C. 9611(p)(1) (Supp. III 1991) (funding for CERCLA authorized only through fiscal year 1994). As the Court explained in *Braxton* v. *United States*, 111 S. Ct. 1854 (1991), the possibility that Congress will resolve a conflict among the courts of appeals on a question of statutory interpretation is not generally a basis for this Court's refraining from considering the question. On the contrary, the Court explained there that it "[o]rdinarily * * * regard[s] the task as initially and primarily" the responsibility of the Court. *Id.* at 1857. Furthermore, respondents can only speculate that Congress's consideration of CERCLA will resolve the problem at hand. It is entirely possible that Congress will reauthorize CERCLA without any amendments whatsoever,[11] or with amendments that do not address the question presented by the petition.[12] Accordingly, we believe that it would be appropriate for the Court to consider the question at this time.

[10] "Br. in Opp." refers to the brief of the private respondents in opposition to the petition.

[11] That was the result the last time funding was extended. See Omnibus Budget Reconciliation Act of 1990, Pub. L. No. 101-508, § 6301, 104 Stat 1388-319.

[12] We are not aware of any bill pending before Congress at this time that would resolve the question presented by the petition.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
Attorneys

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No. 93-376

IN THE SUPREME COURT OF THE
UNITED STATES,
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, et al.
Respondents.

STANTON ROAD ASSOCIATES,
Petitioner,

v.

LOHREY ENTERPRISES, INC.,
ELECTRONIC VALET SYSTEMS, INC., DAVID
LOHREY AND NATHAN PANG,
Respondents.

JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

AMICUS BRIEF IN SUPPORT OF JOINT PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

John H. Reaves
LAW OFFICES OF JOHN H. REAVES
701 "B" Street, Suite 1300
San Diego, California 92101
(619) 525-2050
Attorney for Gloria Price

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John H. Reaves
LAW OFFICES OF JOHN H. REAVES
701 "B" Street, Suite 1300
San Diego, California 92101
(619) 525-2050
Attorney for Gloria Price

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TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

Gloria Price files this amicus brief in support of the Joint Petition for Writ of Certiorari to United States Supreme Court by Key Tronic Corporation and Stanton Road Associates ("Petitioners"). Petitioners seek resolution of the conflict among five circuit courts as to whether the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA"), 42 U.S.C. § 9601 et seq., allows recovery of attorneys' fees as "response costs" pursuant to 42 U.S.C. §§ 9601(25)[1] and 9607(a)[2]. For the

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[1] 42 U.S.C. § 9601(25) states:

> The terms "respond" or "response" means remove, removal, remedy and remedial action, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

[2] 42 U.S.C. § 9607(a) states:

> (a) Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

(continued...)

2/ (...continued)

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for -

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or

(continued...)

following reasons, Gloria Price ("Price") supports the Petition and urges the resolution of the current conflict in the circuit courts. All parties have consented to Price filing the amicus brief.[3]

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[2] (...continued)

> loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 104(i).
>
> The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of the Internal Revenue Service Code of 1954. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined with reference to the date on which interest accruing under this subsection commences.

[3] Kathryn L. Tucker, on behalf of the Petitioners, granted permission for Price to file her amicus brief by letter dated September 7, 1993; Drew S. Days, III, Solicitor General, on behalf of the United States, granted permission by letter dated September 16, 1993; and Howard L. Pearlman, on behalf of Lohrey Enterprises, Inc, Electronic Valet Systems, Inc., David Lohrey and Nathan Pang, granted permission by letter dated September 17, (continued...)

I.

INTEREST OF PRICE IN THE PETITION

On October 29, 1989, Price and related family members filed suit against the United States Navy ("Navy") and other parties to recover response costs, including attorneys' fees, under CERCLA. She incurred such costs in responding to hazardous levels of asbestos, lead, copper and zinc in her residential backyard discovered during the excavation for a pool. At the time of discovery of those hazardous substances, in October 1988, Price was in the process of moving into the residence after her mother had died and she and her siblings had acquired their mother's residence. Until October 1988, the Price family did not know, and had no reason to suspect, that hazardous substances had been dumped there in the mid-1930s by the Navy and that hazardous

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3/ (...continued)
1993. Copies of all letters are attached hereto as Exhibit "A".

levels of such substances ranged from the surface to about three feet in depth.

Governmental agencies, including the United States Environmental Protection Agency ("US EPA"), California Department of Health Services and the San Diego County Department of Health Services, each played a role in investigating the contamination problem which was found to encompass four residential properties (the "site").

To no avail, the governmental agencies requested assistance from the Navy in determining whether the Navy had been involved in dumping hazardous substances at the site due to reports by eye witnesses that there was a "Navy dump" on the site in the mid-1930s. Also, Navy artifacts were found buried at the site. The Navy never admitted any responsibility for the site nor contributed to resolving the problem. Instead, in December, 1989, the State of California proceeded to clean

up the yards of the affected properties at a price of nearly half a million dollars.

As early as February 1989, Price contacted the Navy, requesting information as well as assistance. In June 1989, Price gave a sixty (60) day notice of intent to file a lawsuit under CERCLA. Never receiving any meaningful response, she filed a lawsuit in October, 1989.

Price quickly conducted discovery and then informed the court she was prepared to file a motion for summary adjudication on the sole issue of the Navy's liability under CERCLA. The Navy repeatedly sought to forestall such hearing, claiming a need for additional discovery into the subject of response costs; the Navy successfully forestalled the motion for nearly two years.

The court finally granted Price permission to file her motion for partial summary adjudication. The Navy, in its opposition to Price's motion, conceded for

the first time that it had transported the aforementioned hazardous substances to the site in the mid-1930s. On April 13, 1992, the court ruled the Navy was liable under 42 U.S.C § 9607(a) of CERCLA.

Thereafter, Price filed a second motion for partial summary adjudication as to whether "response costs" under CERCLA included attorneys' fees. On June 25, 1992, the court ruled that reasonable attorneys' fees were recoverable as "response costs" under CERCLA. By the time the court found the Navy liable under CERCLA, attorneys' fees were already over one quarter of a million dollars.

In September 1992, trial was assigned to another judge. That judge denied the Navy's motion for reconsideration on the issue of attorneys' fees. At the Navy's urging, the court required evidence of reasonable attorneys' fees to be presented at trial instead of in a post-trial cost bill as the initial judge had

contemplated. Price presented expert testimony that the reasonable attorneys' fees, using a lodestar calculation, were over $400,000. After trial, again at the Navy's urging, the court allowed briefing on the issue of billing discretion. Several weeks later and shortly before the Ninth Circuit's ruling in Key Tronic and Stanton Road, the court reversed itself and held attorneys' fees were not recoverable under CERCLA.

Price's appeal to the Ninth Circuit, raising the attorneys' fee issue under CERCLA as well as other issues, is currently pending. (Gloria Price v. United States Navy, et al., No. 93-55447.)

II.

ARGUMENT

A. **BACKGROUND OF LEGAL ISSUE**

Legislative history from one House Committee shows that the amendment of "response" under CERCLA in 1986 to include "enforcement costs related thereto" was

intended to clarify and confirm that enforcement costs are recoverable from responsible parties as removal or remedial costs under 42 U.S.C. § 9607(a). H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 1985 (1986).

In a separate Committee report, however, Congress expressly stated the amendment confirmed EPA's authority to recover its enforcement costs. However, that report is silent as to the ability of private parties to recover enforcement costs. H.R. Rep. No. 253, 99th Cong., 1st Sess. pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. at 2835, 2848-49. For that reason, some courts question whether Congress intended private parties to be able to recover "enforcement costs".

CERCLA does not define "enforcement". Although intertwined and often not distinguished, there are really two separate issues that were not expressly addressed by Congress regarding private parties'

recovery of enforcement costs. First, did Congress intend private parties to bring "enforcement actions", so as to conclude private parties engage in "enforcement activities"? Second, if private parties do engage in "enforcement activities", did Congress intend them to recover "enforcement costs" against responsible parties, including the United States? Price contends a private party's cost-recovery action is an enforcement action for the following reasons.

First, private cost-recovery actions are brought precisely because the EPA has chosen *not* to initiate litigation. The EPA has options to initiate an abatement action (42 U.S.C. § 9606(a)[4/]), cost-

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[4/] 42 U.S.C. § 9606(a) states:

> In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as

(continued...)

recovery action (42 U.S.C. § 9607(a)), or to intervene after receiving notice of a private party's intention to file a cost-recovery action (42 U.S.C. § 9613(i)[5]).

Second, both private parties and the EPA appear to engage in "enforcement activities" to the extent they seek to *enforce* CERCLA's strict liability provisions upon responsible parties.

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[4] (...continued)

> may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require. The President may also, after notice to the affected State, take other action under this section including, but not limited to, issuing such orders as may be necessary to protect public health and welfare and the environment.

[5] 42 U.S.C. § 9613(i) states:

> (i) INTERVENTION. - In any action commenced under this Act or under the Solid Waste Disposal Act in a court of the United States, any person may intervene as a matter of right when such person claims an interest relating to the subject of the action and is so situated that the disposition of the action may, as a practical matter, impair or impede the person's ability to protect that interest, unless the President or the State shows that the person's interest is adequately represented by the existing parties.

CERCLA is a remedial statute to be broadly construed to avoid frustration of its beneficial legislative purposes. Wilshire Westwood Association v. Atlantic Richfield, 881 F.2d 801, 804 (9th Cir. 1989).

Third, it is EPA policy to encourage private party cleanups which would otherwise be left to the EPA. The EPA has expressly encouraged private cleanups and the removal of unnecessary obstacles to said cleanups:

> EPA believes that it is important to encourage private parties to perform voluntary cleanups of sites, and to remove unnecessary obstacles to their ability to recover their costs from the parties that are liable for the contamination.

55 Fed.Reg. at 8792-93 (March 8, 1990).

Those courts allowing private parties to recover enforcement costs have not found Congressional silence on either point to be troubling. Instead, they have

read CERCLA "as a whole" by (1) focusing on the "plain" meaning of the phrase "enforcement activities related thereto" as a "response cost" and then (2) giving full effect to the statutory right that "any person", not just the government, may recover necessary "response costs", pursuant to 42 U.S.C. § 9607(a).

Congressional silence on the meaning of "enforcement activities" and the lack of express pronouncement regarding "attorneys' fees", however, have been raised as stumbling blocks to private party recovery of enforcement costs against responsible parties under CERCLA, including the United States. Those courts denying attorneys' fees cite the absence of an express provision allowing recovery of "attorneys' fees" and rely upon the "general rule" that a prevailing private party must absorb its own litigation costs.

/ / /

Price contends, however, that "enforcement activities" are purposefully broader than and inclusive of legal activities. The recovery of enforcement costs should include attorneys' fees as well as other enforcement costs. In other words, Congress meant exactly what it said.

Those courts allowing recovery of attorneys' fees also face the secondary issue of whether a party can recover such fees against the United States. CERCLA contains a waiver of sovereign immunity which reads as follows:

> **Application of Act to Federal Government.** (1) In general, each department, agency, and instrumentality of the United States (including the executive, legislative and judicial branches of government) shall be subject to, and comply with, this Act in the same manner and to the same extent, both procedurally and substantively, as any non-governmental entity, including liability under Section 107 of this Act.

42 U.S.C. § 9620(a)(1).

Price contends the foregoing section should allow recovery of enforcement costs by private parties against the United States.

B. **THE UNITED STATES' GOAL OF CLEANING UP CONTAMINATED SITES WILL BE SEVERELY UNDERMINED UNLESS ATTORNEYS' FEES ARE RECOVERABLE AS RESPONSE COSTS UNDER CERCLA**

The US EPA must enlist the voluntary participation of parties, such as Price, to achieve its goal of cleaning up America's contaminated sites. Price paid approximately $30,000 to remove or contain the excavated, contaminated soils on her property after which the governmental agencies then decided how to fully address the problem.

In the case involving Price, the United States has had an inherent conflict of interest which has resulted in the Navy undermining the goal of the US EPA: the US EPA, as an enforcer of the United States' environmental laws, has had a conflict

with the Navy as a defendant trying to reduce its liability for the contamination it caused.

To complicate matters, the United States has unlimited resources, relatively speaking, to wear down plaintiffs who seek to recover CERCLA response costs. In the case of Price, for example, Price lacked the personal resources to pay for major CERCLA litigation, although she managed to belatedly pay a substantial portion of her legal fees due to settlements in other insurance litigation. Perhaps as a result of her lack of resources, the Navy never expressed any genuine interest in settling her claim or resolving the case through alternative dispute resolution. Instead, the Navy offered to settle the case for $1.99 prior to when the court ruled it was liable under CERCLA and $5,000 after that time.

The Navy left no option to Price but to go to trial or give up the claim and

for her counsel to absorb most of the risks. As long as the United States or other well-financed defendants can litigate in an oppressive manner with impunity, parties will be deterred from voluntarily cleaning up contamination and pursuing a cost-recovery action under CERCLA.

C. **DEFENDANTS' LITIGATION STRATEGIES ARE AFFECTED BY WHETHER A PLAINTIFF CAN RECOVER ATTORNEYS' FEES UNDER CERCLA**

An unfortunate by-product of the adversarial system is that defendants with superior economic strength will often try to wear down a plaintiff financially. If no attorneys' fees are recoverable under CERCLA, defendants will be given an overwhelming advantage when faced with an economically disadvantaged plaintiff; such advantage will encourage the offensive defense of attrition.

The greatest obstacle, therefore, to the voluntary participation in a cleanup is the inability of a party who has

incurred response costs to be made whole under CERCLA or to pass the full costs of pollution onto the polluting party if attorneys' fees are not recoverable. Accordingly, the resolution of the issue of attorneys' fees has tremendous national significance.

Such limitation is particularly poignant in the case of Price because she did not cause the pollution and she inherited the property without knowing it was contaminated. She then incurred response costs, and the Navy denied any liability or responsibility for three and one-half years before conceding it had transported hazardous substances to her site. Moreover, the Navy was unwilling, even then, to try to settle the matter in good faith. Had the Navy understood it would have to pay attorneys' fees if Price proved the Navy liable under CERCLA, then it would have had a more difficult time

/ / /

justifying stonewalling or fighting her meritorious claim the way it did.

D. **THE DISADVANTAGED PLAINTIFF PAYS THE MOST IF ATTORNEYS' FEES ARE NOT RECOVERABLE**

From a legal perspective, Price's case had merit, and she ultimately prevailed at trial in that the Navy was held liable for response costs she incurred. Price may have won the battle, but she clearly lost the war due to the denial of attorneys' fees.

As a practical matter, Price represents that large class of people who, due to their poor financial condition, are unable to secure legal representation unless counsel takes the matter on contingency. Given the extremely complicated, long-term, expensive and risky nature of CERCLA litigation, such representation is virtually impossible to find without the possibility of a prevailing party recovering its attorneys' fees. If such fees are not recoverable

under CERCLA, voluntary participation in the cleaning up of contaminated sites will be substantially diminished; parties such as Price will likely forego voluntarily devoting any resources to the cleanup of other parties' pollution, knowing a cost-recovery action cannot make them whole but will put them in a far worse position than if they had done nothing.

Attorneys, such as myself, will not be willing to take cases such as the Price lawsuit on a contingency basis. I was a sole practitioner when I took the Price case. The financial strains proved crushing. In large part due to that, I joined a law firm during the critical two years leading up to trial to muster resources to press Price's case forward. I proceeded under the assumption CERCLA allowed recovery of attorneys' fees. Price likely would not have gone to trial if the district court had not initially

/ / /

held that attorneys' fees are recoverable under CERCLA.

III.

SUMMARY OF ARGUMENT

Price's interest in the resolution of the above-entitled matter is based on her pending appeal to the Ninth Circuit. Price's appeal raises a number of issues, including recoverability of attorneys' fees under CERCLA.

Price contends that attorneys' fees are enforcement costs under CERCLA and that private parties' cost-recovery actions are enforcement actions under CERCLA, thereby allowing the recovery of attorneys' fees. The recovery of attorneys' fees by private parties is critical to the United States' goal of invoking the voluntary assistance of its citizens in the cleaning up of contamination caused by others. This is especially true when response costs are incurred by innocent parties and the

contamination is caused by defendants who might seek to wear down plaintiffs in order to gain an unfair advantage. If defendants know in advance they will be held liable for attorneys' fees, extensive litigation will likely be reduced, justice will be served and more money will be spent on actually cleaning up contaminated sites.

IV.

CONCLUSION

Although the court found Price was not responsible for the contamination on her property, and awarded her some response costs, there is no question that the costs of litigation have resulted in a pyrrhic victory. The costs have been far too high, both to Price and her counsel, if attorneys' fees are not recoverable.

Cost-recovery actions under CERCLA have burgeoned over the last several years. Undue judicial time and tremendous litigant resources will continue to be

consumed until this Court issues the final word on the subject of attorneys' fees. Price and other parties similarly situated have devoted considerable resources to acting responsibly by voluntarily cleaning up contaminated sites and then seeking recovery of response costs from responsible parties who have shirked their responsibility. It is important to equitably and uniformly apply CERCLA throughout the United States. The issue of attorneys' fees has tremendous national significance. For these reasons, Price respectfully requests this honorable Court to accept the Joint Petition for Writ of Certiorari.

Respectfully submitted,

LAW OFFICES OF JOHN H. REAVES

By:
John H. Reaves,
Attorney for Gloria Price

Dated: September 27, 1993

Supreme Court, U.S.
FILED
JAN 26 1994
OFFICE OF THE CLERK

No. 93-376

In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioners,
v.
UNITED STATES, ET AL.,
Respondents.

ON A WRIT OF CERTIORARI TO
THE COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

James R. Moore
(Counsel of Record)
Mark W. Schneider
Michael Himes
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888
Counsel for Petitioner

Drew S. Days, III
(Solicitor General)
Department of Justice
Washington, D.C. 20530
(202) 514-2217
Counsel for Respondents

Petition for Writ Of Certiorari Filed September 3, 1993
Certiorari Granted December 13, 1993

50 pp.

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Order Granting Petition for Certiorari 48

The following opinions have been omitted in printing this joint appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Opinion of the United States District Court for the Eastern District of Washington, dated March 19, 1991, as amended August 12, 1991 B-1

Opinion of the United States Court of Appeals for the Ninth Circuit, dated January 28, 1993 A-1

Order of the United States Court of Appeals for the Ninth Circuit Denying Petition for Rehearing, and Suggestion for Rehearing En Banc, entered June 7, 1993 E-1

RELEVANT DISTRICT COURT DOCKET ENTRIES—KEY TRONIC CORPORATION v. UNITED STATES, ET AL., NO. 89-CV-694 (E.D. Wa.)

Docket No.	*Description*
1.	COMPLAINT (Summons(es) issued) (sw)[Entry date 10/17/89]
9.	ANSWER by defendant USA, defendant USAF (dg) [Entry date 12/21/89]
22.	MOTION by USA to dismiss (lm)
44.	Statement of material facts by plaintiff Key Tronic Corp in support of Key Tronic's Opposition to Defendant Schmidt's Motion for Summary Judgment
67.	ORDER Re: Motions for Summary Judgment, Inter Alia by Chief Judge Justin L. Quackenbush (pltf's Second, Third & Fourth Claims for Relief are DISMISSED WITH PREJUDICE against defts U.S., the Air Force and Rice; the First Claim for Relief is DISMISSED WITH PREJUDICE against these defts w/respect to any costs or obligation incurred by pltf pursuant to the Consent Decree entered in DOE and EPA v. County of Spokane And Key Tronic Corp., C-89-033-RJM; these defts motion to dismiss the First Claim for Relief is DENIED w/ respect to pltf's action to recover private response costs under 42 U.S.C. 9607; the Complaint and all Claims therein against deft William Schmidt are DISMISSED WITH PREJUDICE; Key Tronic's motion for partial summary judgment is GRANTED IN PART and DENIED IN PART; the Court grants summary judgment establishing the liability of the Air Force under 42 U.S.C. 9607; in all other respects, Key Tronic's

motion for partial summary judgment is denied; Key Tronic's motion to compel discovery from the Air Force is granted; the Air Force's motion for a protective order is DENIED) (cc: all counsel) COB-101-10 (lm)

92. CONSENT DECREE by Chief Judge Justin L. Quackenbush (resolving USA's liability to Key Tronic for certain claims; USA shall pay to Key Tronic $185,000.00; see decree for other claims still disputed) (cc: all counsel) COB-103-78 (sw)

94. MOTION by plaintiff Key Tronic Corp for partial summary judgment that response costs are recoverable (sw)

115. USA's opposition to motion for partial summary judgment that response costs are recoverable and supplemental motion to dismiss (sw)

125. ORDER re: Pltf's Motions for Summary Judgment by Chief Judge Justin L. Quackenbush (denying motion to stay as moot [113-1]; granting motion for enlargement of time [107-1]; denying as moot motion for partial summary judgment that Alumax is a "covered person" [103-1]; denying as moot motion for partial summary judgment re contribution claim against Alumax [99-1]; granting motion for partial summary judgment that response costs are recoverable [94-1]: Case mgmt ddl set 4/18/91 parties to submit stipulation as to damages within 30 days of entry of this order) 9cc: all counsel) (sw)

134. Stipulation (lm)

137. ORDER of Final Judgment by Chief Judge Justin L. Quackenbush (granting motion for entry of final judgment [135-1]; the Clerk of the Court is directed to enter a judgment against the United States, the United States Air Force and Donald B. Rice in favor of Key Tronic in the amount of $155,500.00) (cc: all counsel) COB-106-23 (lm)

138. JUDGMENT (cc: all counsel) COB-106-24 (lm)

140. NOTICE OF APPEAL by defendant Donald B. Rice, defendant USAF, defendant USA from Dist. Court decision [137-1] (cc: all counsel and 9CCA) (lan) [Entry date 09/10/91]

146. Mandate [CCA: 91-36021] from 9CCA (It is now here Ordered & adjudged by this Crt, that the judgment of the said District court in this cause be and hereby is REVERSED;) [140-1] (cc: all counsel) (vr)

RELEVANT CIRCUIT COURT DOCKET ENTRIES—KEY TRONIC CORPORATION v. UNITED STATES, ET AL, NINTH CIRCUIT NO. 91-36021

Docketing Date	*Description*
9/24/91	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Sent appellant(s) civil appeals docketing statement, setting schedule as follows: CADS due 10/8/91 for Eileen T. McDonough; appellant's designation of RT is due 9/9/91,,; appellee's designation of RT is due 9/18/91; appellant shall order transcript by 9/30/91,,; court reporter shall file transcript in DC by 10/29/91; certificate of record shall be filed by 11/5/91; appellant's opening brief is due 12/16/91,,; appellees' brief is due 1/14/92; appellants' reply brief is due 1/28/92,,; [91-36021] (rv)
10/1/92	CALENDARED: San Francisco 11/2/92 1:30 p.m. Courtroom 2 [91-36021] (dd)
10/13/92	Filed, as of 1/13/92, certified record on appeal in 10 Vols. (total); 10 Clerks Rec, 0 RTs (ORIGINAL) [91-36021] [91-36021] (mag)
11/2/92	ARGUED AND SUBMITTED TO Joseph T. SNEED, Arthur L. ALARCON, William C. CANBY [91-36021] (ch)

1/28/93	FILE OPINION: REVERSED (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Joseph T. SNEED; Arthur L. ALARCON, author; William C. CANBY, dissenting.) FILED AND ENTERED JUDGMENT. [91-36021] (ck)
2/11/93	Filed original and 40 copies Appellee Key Tronic Corp petition for rehearing with suggestion for rehearing banc 8 p. pages, served on 2/10/93 (PANEL AND ALL ACTIVE JUDGES) [91-36021] (sf)
6/7/93	Filed order (Joseph T. SNEED, Arthur L. ALARCON, William C. CANBY,): The petition for rhrg is denied & the suggestion for en banc rhrg is rejected. [91-36021] (mhf)
6/15/93	MANDATE ISSUED [91-36021] (sf)
9/17/93	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 93-376 filed on 9/7/93. [91-36021] (sf)
12/20/93	Filed Supreme Court order (SC Date: 12/13/93) granting certiorari petition to (PANEL). [2429836-1] [91-36021] (jr)

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his individual capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation; and WILLIAM SCHMIDT, an individual,

Defendants.

NO. C-89-694-JLQ

AFFIDAVIT OF DAVID L. POWERS

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

DAVID L. POWERS, being first duly sworn, upon oath, deposes and says:

1. I am the Vice President, General Counsel and Secretary of Key Tronic Corporation. I have held that position since July 19, 1988. From August 5, 1987 until July 18, 1988, I held the position of General Counsel and Secretary. Prior to that time, I held the position of Acting

General Counsel and Assistant Secretary. I have been responsible for implementing and supervising the potentially responsible party ("PRP") search regarding the Colbert Landfill and negotiating the consent decree.

2. Key Tronic acknowledged that it had taken waste solvents and other waste chemicals to Colbert Landfill whenever asked about that issue by county or state officials over the years. A good example is the survey conducted by Damon Taam of the county in early 1980, the results of which are set forth in the letter of June 4, 1980, attached as Exhibit A to this affidavit. However, other entities that landfilled chemicals at Colbert Landfill were not, and have not been, as forthcoming. When it became clear in 1986 that potential Superfund liability for cleaning up the landfill and groundwater contaminated by it would be extraordinarily expensive, Key Tronic began an effort to identify other entities that contributed to the problem.

3. With the assistance of the Popham Haik law firm from Minneapolis, local counsel, Goss, Moe & Sampson, and A&A Properties, an investigation of potentially responsible parties was begun in ____ of 1986. This involved undertaking numerous witness interviews, filing contribution lawsuits against various entities believed to have landfilled chemical wastes at Colbert, and conducting discovery to determine the extent of responsibility of these entities. The PRP investigative costs associated with these activities during 1986 and 1987 were $121,589.36 for Popham Haik and $9,464.52 for Goss, Moe & Sampson. These costs are summarized on Exhibit B. Key Tronic does not seek, in this motion, to recover the fees paid to A&A Properties.

4. In late 1986 I was promoted to the position of Acting General Counsel and Assistant Secretary for Key Tronic. Thereafter, I made the decision to employ the Perkins Coie law firm and new local counsel, MacGillivray & Jones, to continue the PRP investigative effort. After familiarizing themselves with the evidence already gathered, and

conducting additional witness interviews, the investigation was narrowed to several PRPs, including Fairchild Air Force Base, Alumax and its predecessor companies, William Schmidt, and several additional private entities (United Paint, which was in bankruptcy, Husky Oil, and Williams Trucking). The investigation continued via both the discovery process in the pending state and federal landowner contribution cases (depositions and document production from the Air Force and Alumax) and witness interviews conducted by Perkins Coie lawyers and Robert Bailor, a private investigator.

5. The PRP investigative fees and costs associated with the Perkins Coie effort are estimated to have been $62,492.18. These were estimated by Perkins Coie based upon a breakout of PRP investigation fees and expenses from other fees and expenses relating solely to other matters. The fees and expenses for Robert Bailor were $2,462.21. These costs are summarized on Exhibit B. Key Tronic does not seek, in this motion, to receive fees paid to McGillivray & Jones.

6. In 1988, the information developed through this investigation was shared with US EPA. As a result, EPA issued Superfund notice letters to the Air Force and Alumax—something it had declined to do prior to 1988.

7. During 1987 and 1988, Perkins Coie was also retained to represent Key Tronic in negotiating a settlement of the potential Colbert Superfund cleanup case anticipated to be brought by EPA and DOE to accomplish a final remedial action at the site. Assisting in that effort on technical issues were, first, the engineering firm of Dames and Moore, and later the firm of Landau Associates, Inc. Landau Associates, Inc. reviewed the reports of EPA and DOE, conducted independent analyses, evaluated the efficiency of the proposed remedy, and met with EPA and DOE officials. The negotiation process culminated in the Consent Decree executed in 1988, by EPA, DOE, Key

Tronic, and Spokane County. The Air Force participated in those discussions but concluded its settlement with EPA in a separate Interagency Agreement finalized in February 1990.

8. The fees and expenses associated with the Perkins Coie effort with respect to settlement of the case with EPA and DOE are estimated to have been $160,641.23. These were estimated by Perkins Coie based upon a breakout of settlement-related fees and expenses from other fees and expenses relating solely to other matters. The fees and expenses for Dames and Moore amounted to $22,323.09. The fees and expenses for Landau Associates amounted to $126,270.53. These costs are summarized on Exhibit B.

9. Key Tronic has paid $1.3 million to date pursuant to the Consent Decree. Key Tronic is obligated to pay a total of $4.2 million under the Consent Decree.

10. As the company executive supervising the PRP search and negotiation of the Consent Decree I spent approximately 70% of my professional time from the fall of 1986 to July 1988 and 40% of my professional time from July 1988 to February 1989 on these and related matters. My salary in the fall of 1986 was $2710.00 per month. Change of salary:

1/11/87	- $2940.00 per mo.
4/16/87	- $3195.00 per mo.
7/12/87	- $3465.00 per mo.
10/18/87	- $3810.00 per mo.
1/10/88	- $4377.00 per mo.
4/03/88	- $4814.70 per mo.
6/26/88	- $5296.17 per mo.

11. All of the above-referenced costs are summarized on Exhibit B. The underlying cost records have been maintained and are available for review.

12. All of these costs were paid for by Key Tronic. None of these costs were incurred or paid by the federal government, EPA or USAF.

13. The state, through Carol Thompson, Carol Kraege, Mike Blum, and Fred Gardner of DOE, and federal government, through Neil Thompson of EPA, were advised of Key Tronic's efforts described above.

14. The public was informed of and involved in the response actions undertaken by Key Tronic through various public meetings held in the Colbert community, in Spokane at the Washington State Department of Social and Health Services, in the County Courthouse's Commissioners' public meeting rooms, through the newspaper and TV media, newsletters, and through the regularly scheduled Colbert Cleanup Committee meetings.

15. The response actions described above were cost effective.

16. The defendants were advised of Key Tronic's actions and were asked to participate through legal counsel.

/s/_____
David L. Powers

SUBSCRIBED AND SWORN to before me this ___ day of June, 1990.

Betty A. Traband /s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane
My Commission Expires: March 15, 1994

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff, v. UNITED STATES OF AMERICA; et al., Defendants.	NO. C-89-694-JLQ ORDER RE: MOTIONS FOR SUMMARY JUDGMENT, INTER ALIA

On Friday, July 20, 1990, the Court heard oral argument of the motions discussed below. Kathryn L. Tucker and Mark W. Schneider represented plaintiff Key Tronic Corporation. Eileen McDonough appeared on behalf of the defendants United States, United States Air Force and Donald B. Rice. Dennis Smith was present for defendant William Schmidt, and Leslie C. Nellermoe represented defendants Alumax, Inc. and Alumax Fabricated Products, Inc. This Order sets forth in formal manner the court's oral rulings on the various motions.

I. *Factual Background*:[1]

From 1968 to 1986 Spokane County maintained the Colbert Disposal Site ("Colbert") in Spokane County,

[1] "Facts" set forth as background information are either undisputed or are immaterial to resolution of the various motions before the Court. Where pertinent, the parties' specific factual contentions are discussed below.

Washington. From the early 1970's through 1980, the County contracted to have defendant William Schmidt do the work necessary to construct, improve and complete the landfill. In that capacity, Schmidt accepted and disposed of refuse at Colbert. Key Tronic alleges that between 1975 and 1980, Schmidt accepted liquid chemicals from the United States Air Force ("USAF"); Alumax Fabricated Products, Inc. and Alumax Mill Products, Inc. (hereafter collectively "Alumax"); and Key Tronic Corporation. This Court has previously found that the USAF disposed of hazardous chemicals at Colbert.[2]

In 1980, drinking water wells around Colbert were found to be contaminated by various chemicals, including "TCA." Key Tronic alleges that it incurred, at its own initiative, expenses totaling $1,271,511.10 responding to that discovery.[3]

The Washington Department of Ecology ("DOE") and the United States Environmental Protection Agency ("EPA") also responded to the Colbert situation. These events culminated in the simultaneous entry of a Complaint and Consent Decree in *DOE and EPA v. County of Spokane and*

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[2]*See, Key Tronic v. United States*, C-87-20-JLQ (E.D. Wa.), transcript dated November 7, 1989; Ex. 1 to Plaintiff's Motion for Partial Summary Judgment ("Plaintiff's Motion"), p. 3.

[3]Specifically, Key Tronic alleges that it spent:

1. $115,788.07 investigating the extent and level of contamination;

2. $580,479.99 to provide temporary and then permanent alternative sources of drinking water to residents of the contaminated area;

3. $196,008.27 in order to locate other entities that disposed of hazardous waste at Colbert;

4. $70,000.00 in the opportunity cost of Key Tronic's executive's time; and

5. $309,234.85 on consultation and attorneys' fees to negotiate the Consent Decree and Scope of Work and to comment on the Remedial Investigation and Feasibility Study.

Key Tronic Corp., C-89-033-RJM (E.D. WA), on January 9, 1989. In the Consent Decree, Spokane county agreed to implement and finance a final remedial action plan, which Key Tronic agreed to help fund in the amount of $4.2 million.[4]

Concurrent with the entry of the Consent Decree, the EPA entered an Administrative Order on Consent and Interagency Agreement ("Order/Agreement") with the USAF.[5] The Order/Agreement was issued as an "Expedited Final Settlement" under 42 U.S.C. § 9622, which permits the EPA to enter into an agreement with potential responsible parties ("PRPs") whose proportional contribution to a release of hazardous substances is deemed by the EPA to have been *de minimis* in terms of quantity and relative toxicity. 42 U.S.C. § 9622(g)(1)(A). Under the Order/Agreement, the USAF agreed to pay $1.45 million to the Colbert clean-up fund. In return, the EPA released the USAF from further liability. Additionally, the EPA granted the USAF the "contribution protection" authorized by 42 U.S.C. § 9622(g)(5).

In October 1989 Key Tronic filed the instant action. The Complaint alleges that the USAF, Alumax and Schmidt are liable to Key Tronic for a portion of the costs Key Tronic

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[4]As discussed below, the Consent Decree also provides that "EPA, Spokane County and Key Tronic hereby covenant not to sue each other as to all matters alleged or which could have been alleged in the Complaint with regard to the Site, . . ." The covenant not to sue applies "only to Spokane County and Key Tronic, including its respective divisions, officials, officers, directors, principals, agents, servants, employees, successors, and assigns, and not any parent corporation, subsidiaries and affiliates of the County and Key Tronic." Ex. 17 to Plaintiff's Statement of Facts, pp. 55-56.

[5]See Ex. A. to United States' Motion to Dismiss.

incurred in the Colbert clean-up.[6] Specifically, the Complaint alleges that defendants are liable to Key Tronic under three causes of action:

1. The First Claim for Relief requests damages under 42 U.S.C. § 9607(a)(4)(B), which establishes a private right of action against responsible parties for "any other necessary costs of response incurred by any other person consistent with the national contingency plan";

2. The Second Claim for Relief seeks contribution under 42 U.S.C. § 9613(f)(1), which provides that: "[a]ny person may seek contribution from any other person who is liable or potentially liable under [42 U.S.C. § 9607] during or following any civil action under [42 U.S.C. §§ 9606 or 9607]"; and

3. The Third Claim for Relief seeks contribution under Washington law; RCW 4.22.040 (contribution among parties jointly and severally liable) and RCW 70.105C.040 (joint and several liability among parties liable for a hazardous release).

Finally, the Fourth Claim for Relief seeks a declaratory judgment that defendants are liable for future costs incurred by Key Tronic in responding to the Colbert release.

The Court shall address the parties' various motions in the order in which they were presented.

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[6] As discussed above, Key Tronic alleges that it incurred response costs in two different ways. First, Key Tronic spent $1.2 million in its initial private response to the release. Second, Key Tronic obligated itself to contribute $4.2 million to the clean-up trust fund established by the EPA.

II. *The United States' Motion to Dismiss*

The United States, the USAF, and Rice (hereafter collectively "the USAF") move for dismissal under the "contribution protection" provision of 42 U.S.C. § 622(g)(5).

42 U.S.C. § 622(g)(1) authorizes the EPA to enter *de minimis* settlements with a PRP where the EPA finds both that (1) the amount of hazardous substances contributed to a site by the PRP; and (2) the toxic effects of those substances, are minimal relative to the other hazardous substances at the site. 42 U.S.C. § 622(g)(5) provides: "A party who has resolved its liability to the United States under this subsection shall not be liable for claims for contribution regarding matters addressed in the settlement." The USAF notes that the Order/Agreement includes the required findings, and specifically provides the following contribution protection:

> Subject to the "Reservation of Rights . . . of this Consent Order and Agreement, [EPA] agrees that by entering into and carrying out the terms of this Consent Order and Agreement, the Respondent Air Force will have completely resolved its liability to the United States of America for Covered Matters pursuant to . . . 42 U.S.C. 9622(g)(5), and shall not be liable for claims for contribution for Covered Matters by any other person.

(Order/Agreement, p. 14.)

The Order/Agreement defines "Covered Matters" to "include any and all civil liability for reimbursement of response costs or for injunctive relief pursuant to . . . 42 U.S.C. 9606 or 9607(a), or . . . 42 U.S.C. § 6973, with regard to the Site."

The USAF argues that Key Tronic's claim for contribution under 42 U.S.C. § 9613(f) is expressly prohibited by section 9622(g). Additionally, the USAF argues that Key Tronic's claim for response costs under section 9607 is similarly barred by implication, because the claim is in reality nothing more than an attempt to obtain contribution under a different guise.

In response to the USAF's motion to dismiss, Key Tronic concedes that section 9622(g) prohibits its claim to recover any portion of the $4.2 million Consent Decree obligation, under 42 U.S.C. § 9613(f) (contribution), or 42 U.S.C § 9607(a)(4)(B) (private response cost recovery). Therefore, **Key Tronic's claims against the USAF should be dismissed with prejudice with respect to the $4.2 million Key Tronic must pay pursuant to the Consent Decree**.

With respect to its First Claim for Relief, however, Key Tronic argues that section 9622(g) does *not* bar its direct cause of action against the USAF under 42 U.S.C. § 9607(a)(4)(B), to recover a portion of the $1.2 million Key Tronic spent in its initial private response to the Colbert release. Thus, the issue presented by the USAF's motion is whether the contribution protection provided a settling PRP by 42 U.S.C. § 9622(g)(5) bars a *direct* action by another PRP under 42 U.S.C. § 9607(a)(4)(B) to recover initial response costs privately incurred.

The pertinent language of CERCLA provides some guidance for resolving the issue before the court. Section 9607(a)(4)(B) provides a private right of action to "any other person" who incurs "necessary costs of response" to a release of a hazardous substance. Section 9622(g)(5) provides that a PRP "who has resolved its liability to the United States ... shall not be liable for claims for contribution *regarding matters addressed in the settlement*." (Emphasis supplied.) Thus, to the extent the statutory language is instructive, it does not favor the USAF's motion—section 9622(g)(5)

pertains to "liability to the United States" and to "claims for *contribution*." Key Tronic's action under section 9607(a)(4)(B) is a *direct* action to recover its own response costs—it is not technically a contribution claim, nor does it involve liability to the United States.

The USAF anticipates this quandary, and attempts to meet it by arguing that the contribution protection provided by section 9622 *must* be construed to apply to a PRP's action to recover private response costs under section 9607 in order to effectuate Congress's purpose in empowering the EPA to give contribution protection to *de minimis* PRPs who settle. As stated in SARA, that purpose was "to expedite effective remedial actions and minimize litigation." 42 U.S.C. § 9622(a). The USAF argues that the EPA's "carrot" of contribution protection would be rendered meaningless if other PRPs could avoid it by simply restyling contribution actions as actions to recover "response costs" under section 9607. The USAF cites two cases which it claims support this argument: *United States v. Cannons Eng'g Corp.*, 720 F. Supp. 1027 (D. Mass. 1989), *aff'd*, 899 F.2d 79 (1st Cir. 1990), and *Central Ill. Pub. Serv. Co. v. Industrial Oil Tank & Line Cleaning Serv.*, 730 F. Supp. 1498 (W.D. Mo. 1990).

In *Cannons*, the court considered an indemnification cross-claim by several nonsettling PRPs against a group of PRPs that had settled with the EPA and received contribution protection. Granting a motion to dismiss the cross-claim, the court stated:

> [T]he contribution protection provisions serve the important function of encouraging early settlements. Failure to provide similar protection against suits for equitable indemnity would encourage defendants to re-cast their contribution claims as indemnity claims and injure, if not destroy, the goals to

be served by the express contribution protection provisions of CERCLA.

Id. 720 F. Supp. at 1051-52. The First Circuit Court of Appeals affirmed under a similar rationale. 899 F.2d at 92.

Industrial Oil Tank also holds that a nonsettling PRP may not maintain an equitable indemnity claim against a settling PRP who has obtained contribution protection. The court adopted the rationale in *Cannons verbatim*. *Id.* 730 F. Supp. at 1506-07.

Cannons and *Industrial Oil Tank* must be distinguished from the present case. In those cases, nonsettling PRPs sought indemnity from settling PRPs for prospective liability *to the United States*. Thus, the indemnity claims fell squarely within the situation that apparently prompted Congress to pass section 9622. Here, Key Tronic seeks to recover a portion of the costs it incurred *directly*, at its own initiative, in responding to the release at Colbert. That factual distinction makes the rationale in *Cannons* and *Industrial Oil Tank* inapplicable to this case.

The provision in CERCLA that contribution actions cannot be maintained against settlor PRPs "was designed to encourage settlements and provide PRPs a measure of finality in return for their willingness to settle." *United States v. Cannons Eng'g Corp.*, *supra*, 899 F.2d at 92, *citing* H.R. Rep. No. 99-253, Part I, 90th Cong., 1st sess. 80 (1985), *reprinted in* 1986 U.S. Code Cong. & Admin. News 2835, 2862. With respect to a contribution claim by one PRP against another PRP for liability *to the EPA*, the effect of contribution protection is not inconsistent with the overall purposes behind CERCLA. Those purposes are (1) to facilitate prompt cleanup of hazardous releases, and (2) to place the ultimate burden of a cleanup upon those responsible for creating the hazard. *See Private Response Cost Recovery Actions Under CERCLA*, 34 Kan. L. Rev. 109, 119 (1985). As to liability to the EPA, contribution protection is

consistent with CERCLA's objectives because all PRPs have the same incentive to promptly settle the EPA's claims against them, and the procedures for EPA settlement tend to insure a proper allocation of responsibility upon the parties. *See generally*, 42 U.S.C. § 9622.

When applied to an action under section 9607(a)-(4)(B) to recover private response costs, however, the effects of contribution protection are not necessarily consistent with CERCLA's primary objectives.

First, if contribution protection is applied to preclude recovery of privately incurred response costs, PRPs will be *discouraged* from taking initiatives to clean up hazardous releases. Instead, PRPs would be encouraged to respond only via EPA settlements, since costs incurred in private response actions may not be even partially recovered against other PRPs who do nothing on their own, yet settle with the EPA and obtain contribution protection.

Second, the application of contribution protection to private response cost actions would work against proper allocation of the clean-up burden. Because liability under CERCLA is joint and several, *see United States v. Ottati & Goss, Inc.*, 630 F. Supp. 1361, 1395 (D. N.H. 1985), the EPA might have little incentive to investigate further once it locates one solvent PRP. Application of contribution protection to actions for recovery of private investigation costs will eliminate the incentive 42 U.S.C. § 9607(a)-(4)(B) provides PRPs to identify and locate other PRPs.

The Court also notes that the USAF's argument is founded upon an assumption that may not be valid in the context of this case. The USAF argues that "[i]f Key Tronic could evade the contribution protection provided by [section 9622(g)(5)] simply by styling its claim as a cost recovery action under [section 9607], instead of a contribution action under [section 9613], section [9622(g)-(5)] would be deprived of any practical significance and

hence any utility to EPA." (USAF's Memo., p. 12). Here, the validity of that argument is not self-evident. Even if actions to recover private response costs under section 9607 are permitted, a PRP *still* has an incentive to settle with the EPA under section 9613 or 9622. Settlement with the EPA still offers the advantages of avoiding litigation, fixing liability and precluding contribution *vis a vis* costs incurred *by the EPA*. The facts here are a case in point—the USAF need not worry about a contribution claim by Key Tronic with respect to the $4.2 million EPA-Key Tronic settlement. Alumax and Schmidt, on the other hand, who did not settle, are subject to Key Tronic's contribution claim. Thus, the incentives a PRP has to settle with the EPA under section 9622 are not necessarily "eliminated" by recognition of the private cause of action provided in 42 U.S.C. § 9607(a)(4)(B).

From the above, it is evident that the USAF's argument imputes an effect to section 9622 that runs contrary to the overall purposes of CERCLA. Further, the USAF's position would create an unnecessary inconsistency between the various sections of CERCLA. Both of these results are to be avoided. This court must strive to interpret and apply section 9622 so that it is consistent with the language of CERCLA's other sections and with the purposes of the entire statute considered as a whole. *Adams v. Howerton*, 673 F.2d 1036, 1040-41 (9th Cir. 1982), *cert. denied*, 458 U.S. 1111 (1982).

Aside from the analysis above, there is little to assist the court in deciding the issue before it. It has been noted that CERCLA as originally passed by Congress was "an eleventh-hour piece of legislation" drawn in the "final days of a lame-duck session." *Private Response Cost Recovery Actions Under CERCLA*, *supra*, 34 Kan. L. Rev. at 109. "In general, CERCLA's sketchy legislative history limits its interpretative usefulness." *Id.*, pp. 118-19. Nor does the legislative history of SARA (which introduced *de minimis* settlements and contribution protection under section 9622), provide any assistance with regard to the issue before the court. *See*, *Settlement Policy Under the Superfund*

Amendments and Reauthorization Act of 1986, 58 U. Colo. L. Rev. 599 (1988). It appears that the potential interplay between sections 9607 and 9622 was not considered by Congress. *See id.* (discussing legislative history of SARA). However, at the time Congress passed SARA, at least two courts had recognized a private right of action under section 9607(a)(4)(B). *See Jones v. Inmont Corp.*, 584 F. Supp. 1425 (S.D. Oh. 1984); *New York v. EXXON Corp.*, 633 F. Supp. 609 (S.D.N.Y. 1986) (action by a PRP). It does not seem reasonable that Congress would intend to eliminate a recognized *direct* cause of action for one class of persons (PRPs) by providing for *contribution* protection in another section that applies to settlement with the EPA.

This last point raises yet another issue. Since the USAF concedes that section 9607 creates a private right of action for recovery of response costs incurred by a PRP, it must also confront the logical conclusion of its position—that by enacting section 9622(g)(5) Congress granted the EPA the administrative power to eliminate a person's right to recover response costs, without even requiring a hearing procedure to which the affected person is a party. The USAF attempts to meet that issue by arguing that the Supreme Court "has established that Congress can foreclose successive litigation by nonparties pursuant to statutory remedial programs." (USAF Memo., p. 15). However, the cases the USAF cites to support this statement are not on point. *Martin v. Wilks*, 109 S. Ct. 2180 (1989), recognizes in *dicta* an *exception* to the "general rule" that a "judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Id.* at 2184. The Court states in a footnote that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate pre-existing rights if the scheme is otherwise consistent with process." *Id.* n.2. *Martin* cites *NLRB v. Bildisco & Bildisco*, 465 U.S. 513 (1984), and *Tulsa Professional Collection Servs., Inc. v. Pope*, 485 U.S. 478 (1988), which both involve *nonclaim*

statutes (bankruptcy and estate, respectively). These cases do not suffice to resolve the questions of fairness raised by the USAF's argument. In this regard, the court notes that legislative enactments should never be construed as establishing statutory schemes that are illogical, unjust or capricious. *Bechtel Constr., Inc. v. United Bhd. of Carpenters & Joiners*, 812 F.2d 1220, 1225 (9th Cir. 1987).

I find that 42 U.S.C. § 9622(g)(5) does not bar an action by a PRP under 42 U.S.C. § 9607 (a)(4)(B) to recover *privately* incurred initial response costs from a settlor PRP who has obtained contribution protection from the EPA for the final clean-up costs. The section 9607 action is not one for "contribution" of "liability to the United States." Construction of the statute to permit such action is consistent with the overall purposes of CERCLA and SARA, and avoids internal inconsistencies otherwise drawn into the statutory scheme. Finally, this construction prevents the statute from being applied in an unfair, and potentially unconstitutional, manner. Thus, the USAF's motion to dismiss the First Claim for Relief against it should be denied with respect to the $1.2 million Key Tronic allegedly incurred in initial private response costs.

III. *Key Tronic's State Law Claims Against the USAF*

The USAF contends that Key Tronic's state law claims against it are barred by sovereign immunity. Key Tronic did not dispute that argument in its brief, and conceded the appropriateness of dismissal at oral argument. Therefore, Key Tronic's Third Claim for Relief should be dismissed with prejudice as against the USAF.

IV. *Key Tronic's Claim for Declaratory Relief*

Counsel for Key Tronic stated at oral argument that its Fourth Claim for Relief, for a declaratory judgment under CERCLA, pertained only to Consent Decree payments to be

made in the future. Because Key Tronic has conceded that the USAF is not liable for any further costs incurred under the Consent Decree, the Fourth Claim for Relief should be dismissed with prejudice as against the USAF.

V. *Defendant Schmidt's Motion for Summary Judgment of Dismissal*

From 1971 to 1983, defendant William Schmidt ("Schmidt") contracted with Spokane County to "do all work and furnish all tools, materials and equipment necessary to construct, improve and complete" Colbert. (Exhibit B to Schmidt's Statement of Material Facts, hereafter "the Contract.") Plaintiff alleges that Schmidt's performance of the contract qualifies him as an "operator" of Colbert under CERCLA, as defined in 42 U.S.C. § 9601(20)(A). (Complaint, ¶¶ 8, 14 and 29.) Plaintiff alleges that Schmidt's status as an operator of Colbert subjects him to liability under 42 U.S.C. §§ 9607(a) (response cost recovery) and 9613(f) (contribution), and under Washington law, RCW 4.22.040 (contribution among joint tort feasors) and RCW 70.105D.040 (parties responsible for a release of hazardous substances are jointly and severally liable).

Schmidt seeks summary judgment of dismissal based upon the terms of the Consent Decree between the EPA and the DOE, on the one hand, and Spokane County and Key Tronic, on the other, (*Washington Dept. of Ecology v. Spokane Cy.*, C-89-033-RJM, E.D. WA). The Consent Decree provides:

> Except as specifically provided hereafter, . . . *Spokane County and Key Tronic hereby covenant not to sue each other as to all matters alleged or all matters which could have been alleged in the Complaint with regard to the Site . . . . This covenant not to sue applies only to Spokane County and Key Tronic, including its respective* divisions,

> officials, officers, directors, principals, *agents*, servants, employees, successors, and assigns, and not any parent corporation, subsidiaries and affiliates of the County and Key Tronic."

(Exhibit 1 to Complaint, pp. 55-56.) Schmidt alleges that he operated Colbert as Spokane County's agent, and that plaintiff's claims against him here pertain to matters which were or could have been alleged in the previous complaint. Thus, Schmidt argues that Key Tronic may not maintain this action against him.

Schmidt avers the following facts to establish his agency: The contract specified in great detail the operating instructions for the landfill, including the hours of operation, the manner of refuse disposal, and the required equipment. (Defendant's Statement of Material Facts, 3.) Further, Spokane County employees inspected Colbert up to five times a week to insure that Schmidt complied with the contract's performance specifications. County employees, not Schmidt, had responsibility for determining the type of waste accepted. (*Id.* ¶¶ 5-7.) Also, Schmidt disposed of refuse at Colbert as directed by Spokane County. (*Id.*, ¶¶ 8-10, 16.) Finally, the contract expressly provides that Schmidt operated Colbert subject to Spokane County's control. The contract provides:

> 4. *The maintenance and operations of the disposal site shall be under the control of Spokane County* and all work and methods performed by the contractor pursuant to this agreement shall be subject to inspection, approval and direction of the county engineer or his agents at any time.

(*Id.*, Ex. B, p.4, *citing*, Specifications for Operation of Colbert Disposal Site, § IX. ¶4, p. 6.)

Key Tronic disputes Schmidt's agency claim by an allegation that Spokane County's inspectors "did not have the power to order Mr. Schmidt to take any specific actions, and Mr. Schmidt retained the right to dispute any of the inspector's findings." (Plaintiff's Statement of Material Facts, 7.) That allegation, however, is not supported by Key Tronic's citations to the record, *i.e.*, Contract, Section IX."[7]

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[7]For example, paragraph 1 of Section IX of the contract specifications provides that "[c]ell location, alignment and excavation shall be done in accordance with the direction of the engineer." Paragraph 28 of Section IX provides:

> *If the engineer finds that the contractor has failed to perform properly* any of the provisions of this contract and failed to correct such performances within twenty-four (24) hours after verbal or written notice to the contractor or his designated agents has been notified to do so [*sic*], *the engineer may order the contractor to cease all work at the site and/or may arrange for the necessary work at the site to be done by others and the cost of so doing shall be deducted from payments then due or coming due the contractor*; however, in the case of unauthorized fires, the above action may be ordered if such fires are not extinguished within two (2) hours after verbal notification to do so by the engineer. In the case of insufficient or no daily cover, the engineer need not give the contractor twenty-four (24) hours notice but may arrange for the needed cover of the refuse by others to commence any time after 12 o'clock noon on the day following the improper covering of refuse. *At the engineer's option, a penalty of one hundred dollars ($100) may be deducted from payments due or coming due for each day or part thereof in which any improper performance of the contract is left uncorrected* in excess of 24 hours from the engineer's determination time of such improper performance, except that a fifty dollar ($50) deduction may be made for insufficient or no daily cover. *If the contractor fails to execute the work described in the provisions of Section IX, the engineer may terminate this contract* as provided by Chapter 1-08.10 of the State of Washington Standard Specifications for Road and Bridge Construction of 1969.

Taken as a whole, the contract is clear that Schmidt was to "operate" Colbert at the direction and control of Spokane County.

The parol evidence Key Tronic offers in support of its assertion is similarly unavailing. Key Tronic cites the following deposition testimony of Mike Senske, an engineer for Spokane County, who assisted in drafting the contract. (*See* Senske Depo., p. 18.)

> Q. "You indicated [County landfill inspector] Howard Hay had daily control over landfill operation. What exactly do you mean by 'control'?"
>
> A. If [Hay] saw the contractor had inadequately performed his duties that were required the previous day, he had the authority to tell him you will do this today or you will do that. Obviously, the contractor had the right to tell him, you go right to —— you know."

(Senske Depo., p. 26.) This equivocal testimony does not suffice to create a "genuine"[8] issue of fact as to who controlled the operation of Colbert. That conclusion is buttressed by the fact that this was the *only* evidence Key Tronic could offer on this issue. A quick review of the balance of Senske's deposition reveals the true context of the parties' relationship as one where Schmidt acted subject to Spokane County's control.[9]

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[8]*See, Matsushita Elec. Indus. Co. v. Zenith Radio*, 475 U.S. 574 (1986). In *Matsushita*, the Supreme Court stated that when the moving party has carried its burden under Rule 56(c) "its opponent must do more than simply show that there is some metaphysical doubt as to the material facts." *Id.* at 586. "[I]f the factual context renders respondent's claim implausible . . . respondents must come forward with more persuasive evidence to support their claim than would otherwise be necessary." *Id.* at 587.

[9]Senske also testified, *inter alia*, that "the contract specifically required that the contractor at that site was to maintain a hazardous waste disposal area" (p.15); Spokane County decided what substances could be accepted at a particular landfill (p.16); Schmidt "was simply retained as a contract employee" (p.18); one time when Schmidt complained about some "liquid" in drums that was taking paint off his equipment, he was told to accept the material, he had no say in the matter (p.21); and that, with respect to Schmidt's performance of the contract, Spokane County was "more than satisfied. He went the extra mile in all ways." (p.25).

Under Washington law, the undisputed facts establish that Schmidt operated Colbert as Spokane County's agent.[10] "[A]n agency relationship results from the manifestation of consent by one person that another shall act on his behalf and subject to this control, with a correlative manifestation of consent by the other party to act on his behalf and subject to his control." *Moss v. Vadman*, 77 Wn.2d 396, 402-03, 463 P.2d 159 (1969). *See also Matsumura v. Eilert*, 74 Wn.2d 362, 368, 444 P.2d 806 (1968) (same); *Uni-Com North West v. Argus Publishing*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987) (right of control is the "crucial factor"); *Zoda v. Eckert, Inc.*, 36 Wn. App. 292, 296, 674 P.2d 195 (1983) (right of control is "one of the primary requisites" of an agency).

Key Tronic focuses upon the alleged absence of another indicium of agency—the "power to alter the legal relations between the principal and third persons"—to argue that Schmidt was not an agent of Spokane County. *See, Zoda v. Eckert, Inc.*, 36 Wn. App. at 296. The simple answer to that argument is that Schmidt had such power, and exercised it daily by collecting fees and accepting refuse. (*See* Schmidt Depo. Ex. 2 to Plaintiff's Statement of Facts, p. 3, 16.)

Finally, Key Tronic argues that neither it nor Spokane County intended the covenant not to sue to apply to Schmidt. That argument, however, ignores a basic tenet of contract construction—that the parties' intent must be gleaned first from the terms of the agreement. Only if a contract is ambiguous may extrinsic evidence of intent be considered.

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[10]"The existence of a principal-agent relationship is a question of fact unless the facts are undisputed." *Uni-Com N.W. v. Argus Publishing*, 47 Wn. App. 787, 796, 737 P.2d 304 (1987).

Hastings v. Continental Food Sales, Inc., 60 Wn.2d 820, 823, 376 P.2d 436 (1962); *McCombs Constr., Inc. v. Barnes*, 37 Wn. App. 91, 93, 678 P.2d 837 (1984). The existence of ambiguity is a question of law for the court. *R.A. Hanson Co. v. Aetna Ins. Co.*, 26 Wn. App. 290, 295, 612 P.2d 456 (1980).

Key Tronic's argument would require the court to first find ambiguity in the provision of the Consent Decree releasing Spokane County's "agents." The court may not so find. There is nothing in the Consent Decree to suggest that the parties intended the word "agents" to have any meaning other than that ordinarily given it by Washington law. Absent such an indication, a word's ordinary meaning must be given effect. *Cobray v. Stevenson*, 98 Wn.2d 410, 415, 656 P.2d 473 (1982).

Under the unambiguous terms of the consent decree, Key Tronic agreed not to sue Spokane County's agents "as to all matters alleged or which could have been alleged in the Complaint with regard to" Colbert. Key Tronic does not argue that its instant claims against Schmidt could not have been alleged in the prior complaint. Because Schmidt was Spokane County's agent with regard to the operation of Colbert, Key Tronic's claims against him may not be maintained. **The Complaint and all Claims therein against defendant William Schmidt should be dismissed with prejudice.**

VI. *Key Tronic's Motion for Partial Summary Judgment*

Key Tronic moves for summary judgment establishing that all defendants are liable under CERCLA. Key Tronic also seeks to establish the amount of each defendant's exposure. In light of the Court's rulings above, only the following issues need be addressed:

A. The USAF

(i) Liability

Key Tronic moves for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607(a)(4)(B) for a portion of the $1.2 million in costs Key Tronic privately incurred in responding to the Colbert release.

This court has previously held that the USAF disposed of hazardous waste at Colbert. (Oral Findings of Fact and Conclusions of Law, *Key Tronic Corp. v. United States*, C-88-041-JLQ and C-87-20-JLQ (E.D. WA, Nov. 3, 1989), p. 2; Ex. 1 to Plaintiff's Statement of Facts.) This fact establishes the USAF as a "person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9607(a)-(3). It is undisputed that Colbert is a "facility" within the definition of 42 U.S.C. § 9601(9), and that a "release" has occurred at Colbert within the definition of 42 U.S.C. § 9601(22). Thus, under 42 U.S.C. § 9607(a)-(4)(B), the USAF is liable for a portion of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." **Key Tronic's motion for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607 should be granted.**

(ii) Exposure

As discussed above, the USAF is not liable for any portion of the $4.2 million Key Tronic is obligated to pay under the terms of the Consent Decree. Therefore, the question presented here is whether Key Tronic is entitled to partial summary judgment establishing the amount of its private cost recovery claim at $1,271,511.10.

In order to prevail on this issue, Key Tronic must prove by undisputed facts that its claimed costs were (1) "necessary" and (2) "consistent with the national

contingency plan." *City of Philadelphia v. Stepan Chemical*, 713 F. Supp. 1484, 1490 (E.D. Pa. 1989). Necessity and consistency are questions of fact. *Cadillac-Fairview/California v. Dow Chemical*, 840 F.2d 691, 695 (9th Cir. 1988).

Key Tronic's response cost claim is disputed on several grounds. Defendants assail the propriety under CERCLA of several categories of costs claimed, the legitimacy of the claims made here even if the type of cost is not *per se* improper, and the amounts of various cost claims. More importantly, both the USAF and Alumax argue that they have been provided no discovery regarding Key Tronic's response cost claim. The discovery cut-off date in this action is December 31, 1990. Defendants should have an opportunity to examine the nature and amount of the costs claimed. Therefore, **Key Tronic's motion for partial summary judgment establishing the amount of its private cost recovery claim should be denied without prejudice to renew after reasonable discovery.**

B. Alumax

(i) Liability

Key Tronic alleges that Alumax disposed of liquid chemical wastes, including TCA and TCE, at Colbert between 1972 and 1980. (Plaintiff's Statement of Facts, ¶ 3.) Key Tronic supports this allegation with the testimony of two former Alumax employees, Russell Parish and Vernon Peters. Key Tronic asserts that Parish and Peters have testified that they personally took hazardous waste to Colbert. (*See* Ex. 5 & 6 to Plaintiff's Statement of Facts.) Thus, Key Tronic argues that it has established Alumax's liability under State and Federal law.

Alumax disputes plaintiff's allegation by presenting the declaration of Les Wright, the foreman of Alumax's "plating shop." Wright's declaration details how he operated a

"degreasing vat." When the vat was full of waste, Wright would have it cleaned, and the waste would be disposed of. Wright declares: "During the eleven years that I worked for Alumax, *as far as I know*, all of the waste from the vapor degreaser was taken to the Mica Landfill. I know of none going to the Colbert Landfill." (Wright Decl., p. 3.)

The Court notes that Wright's testimony is not an affirmative declaration that "I know that none of the vapor degreaser waste was taken to the Colbert Landfill." However, as Alumax points out, Parish's testimony may be impeachable, and Peters's testimony is equivocal ("I believe" I hauled chemicals to Colbert "once or twice, but I'm not for sure.") In light of the fact that Key Tronic bears the burden of proof on this issue, summary judgment is not appropriate. Therefore, **Key Tronic's motion for partial summary judgment that Alumax is liable should be denied.**

VII. *Discovery Motions*

The USAF moved for a protective order pending disposition of its motion to dismiss discussed above. Key Tronic countered with a motion to compel the USAF to answer the discovery.

The USAF's memoranda on the discovery issue merely offer excuses for its failure to respond on time (counsel was sick, substitute counsel was unaware of the outstanding discovery, etc.) The substantive propriety of the discovery is not contested.

Key Tronic's motion to compel should be **GRANTED**, and the USAF's motion for a protective order should be **DENIED**. Because the USAF has had the outstanding discovery requests for over 7 months, the court orally ordered it to respond thereto by August 9, 1990.

The court finds no substantial justification for the USAF's failure to provide discovery. Therefore, Key Tronic

is awarded the reasonable costs and attorneys' fees of its motion to compel. Key Tronic may file a statement of its costs and fees on the motion. The USAF shall have 10 days from receipt thereof to respond to or oppose the amount claimed. The court will then determine a reasonable amount.

Based upon the foregoing, **IT IS HEREBY ORDERED**:

1. Plaintiff's Second, Third and Fourth Claims for Relief are **DISMISSED WITH PREJUDICE** against defendants United States, the Air Force and Rice. The First Claim for Relief is **DISMISSED WITH PREJUDICE** against these defendants with respect to any costs or obligation incurred by plaintiff pursuant to the Consent Decree entered in *DOE and EPA v. County of Spokane and Key Tronic Corp.*, C-89-033-RJM (E.D. WA, Jan. 9, 1989). These defendants' motion to dismiss the First Claim for Relief is **DENIED** with respect to plaintiff's action to recover private response costs under 42 U.S.C. § 9607.

2. The Complaint and all Claims therein against defendant William Schmidt are **DISMISSED WITH PREJUDICE.**

3. Key Tronic's motion for partial summary judgment is **GRANTED IN PART** and **DENIED IN PART.** The Court grants summary judgment establishing the liability of the Air Force under 42 U.S.C. § 9607. In all other respects, Key Tronic's motion for partial summary judgment is **DENIED**.

4. Key Tronic's motion to compel discovery from the Air Force is **GRANTED**; the Air Force's motion for a protective order is **DENIED**.

IT IS SO ORDERED. The Clerk is hereby directed to enter this Order and furnish copies to counsel.

DATED this 9th day of August, 1990.

/s/_____
JUSTIN L. QUACKENBUSH
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF
WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation,

Plaintiff,

v.

UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his individual capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation,

Defendants.

NO. C-89-694-JLQ

SUPPLEMENTAL AFFIDAVIT OF DAVID L. POWERS

STATE OF WASHINGTON)
) ss.
COUNTY OF SPOKANE)

DAVID L. POWERS, being first duly sworn upon oath, deposes and says:

1. This Affidavit supplements the affidavit I executed in June 1990 ("June Affidavit") in support of Key Tronic's previous Motion For Partial Summary Judgment ("June Motion"). A copy of the June Affidavit is attached as Exhibit P.

2. Attached as Exhibit A is a summary of the costs that Key Tronic has incurred or will incur in connection with the Colbert Landfill for which it seeks summary judgment.

3. In my June Affidavit I described the efforts undertaken by Key Tronic and its attorneys, consultants and investigator to: 1) identify other Potentially Responsible Parties; and 2) develop and shape the final remedy for Colbert. I also identified the costs Key Tronic had incurred related to these efforts. The identification of costs was based on my review of the supporting cost documentation which the company has maintained.

4. Subsequent to the June Motion, Key Tronic was asked by Alumax to produce all of its cost documentation supporting its response cost claims. I authorized the production of these documents and had them sent to Key Tronic's counsel, Perkins Coie.

5. The cost documents were further reviewed by Perkins Coie prior to production. Portions of the documents reflecting fees and expenses paid to Popham, Haik were redacted by Perkins Coie, and certain of the documents reflecting the fees and expenses paid to Goss, Moe & Sampson were not produced. This was done so that the produced documents and costs identified in the documents include only those costs unquestionably linked to the PRP and Consent Decree efforts. This review and redaction process resulted in a net reduction in the amount of costs sought to be recovered in this motion.

6. Prior to the preparation of my June Affidavit and the conduct of my deposition, I had reviewed the cost documentation on which I relied to prepare the June Affidavit. After my deposition and in preparation for this affidavit, I reviewed the documents that Perkins Coie had redacted and produced. Based on this review, I believe that the costs identified in the produced and redacted documents are the lowest conceivable amount of costs attributable to the

PRP and Consent Decree efforts. I continue to believe that the figures set forth in my June Affidavit are accurate and properly attributable to the PRP and Consent Decree work, but the lower figures were selected for this motion to ensure that there would be no issue of fact to preclude summary judgment. In other words, costs sought in the instant motion are the result of a much more conservative approach of identifying costs attributable to the PRP and Consent Decree efforts than was used for my June Affidavit.

7. For purposes of this motion, Key Tronic seeks to recover $47,126.12 in fees and expenses for the work performed by Popham Haik relating to the PRP search. In my June Affidavit, Popham Haik costs for the PRP effort were identified as $121,589.36. While $121,589.36 is the amount of costs actually incurred by Key Tronic for Popham Haik's work relating to the PRP effort, we have, for purposes of this motion, reduced the figure to $47,126.12. This figure includes only those costs which are specifically, directly and unquestionably linked to the PRP effort. The Popham Haik redacted documents which have been produced identify those PRP costs for which we seek reimbursement. The costs sought are based on the amount of attorney and legal assistant time worked on the PRP matter, multiplied by the hourly billing rate of the individual concerned.

Attached as Exhibit B to this affidavit is a summary of the fees and expenses sought to be recovered for each Popham Haik invoice. Attached as Exhibit C are the Popham Haik invoices and Key Tronic payment records on which the summary is based.

8. Here is one example of why the figure for Popham Haik has been reduced. In my June Affidavit, I included Popham Haik fees and expenses associated with the preparation of a complaint for contribution. In my view, the preparation of the complaint was a necessary step so that Key Tronic could conduct formal discovery against certain PRPs. The revised figure excludes Popham Haik fees and expenses

associated with the complaint. This was done to preclude any argument that the complaint fees were not recoverable because the complaint may have served purposes other than the PRP search. I still believe that such fees are properly recoverable as PRP search costs, but have not sought such fees in this motion.

9. I am of the view that all of Popham Haik's work contributed at least indirectly to identification of PRPs. They, along with Goss, Moe & Sampson, did the first investigation of PRPs at the Colbert site, identified entities that were likely to have taken chemical wastes to Colbert, filed complaints in state and federal court against those entities (including Alumax and the Air Force), and engaged in substantial investigation and discovery regarding whether and in what amounts chemical costs were taken by those entities to Colbert. Arguably, all of the legal research and drafting associated with that effort contributes to PRP identification. Nevertheless, it is possible to take a more narrow view of the PRP investigative effort and include only those costs directly associated with investigation, discovery, and document analysis. For purposes of this motion, we are seeking only reimbursement of costs specifically and directly related to such efforts.

10. Key Tronic seeks summary judgment with respect to $5,215.48 in fees and expenses for the work performed by Goss, Moe & Sampson relating to the PRP search. In my June Affidavit, the Goss, Moe costs for the PRP search were identified as $9,464.52. While $9,464.52 is the amount of costs actually incurred by Key Tronic for Goss, Moe's work related to the PRP search, we have, for purposes of this motion, reduced the figure to $5,215.48. Again, this figure includes only those costs which are specifically and directly linked to the PRP effort. This reflects the same conservative approach that was taken with respect to the Popham Haik costs discussed in paragraphs 6 through 9 above. It is based on the amount of attorney and paralegal time worked on the

PRP matter, multiplied by the hourly billing rate of the individual concerned.

Goss, Moe documents were not redacted, but only those invoices which referenced services unquestionably related to the PRP effort were produced. Even the figures on the produced invoices were sometimes reduced. For example, the July 29, 1986 invoice had billed Key Tronic for fees of $3,086.25 and expenses of $555.26. The amount sought in this motion for that invoice is only $1,000 in fees and $0 in expenses. This was done because certain of the entries on the invoice do not explicitly reference PRP work. The reduction to $1,000 is the lowest possible amount attributable to PRP work. A similar reduction and analysis were used for the August 25, 1986 invoice.

The amounts sought for each of the produced Goss, Moe invoices are identified in the documents produced. Attached as Exhibit D is a summary of the fees and expenses sought to be recovered for each Goss, Moe invoice. Attached as Exhibit E are the Goss, Moe invoices and Key Tronic payment records on which the summary is based.

11. For purposes of this motion, Key Tronic seeks to recover $62,492.18 in fees and expenses relating to Perkins Coie's PRP search, and $160,641.23 in fees and expenses relating to Perkins Coie's efforts in negotiating the Consent Decree. These are the same figures that were identified in the June Affidavit. The figures are based on the amount of attorney or paralegal time worked on PRP or Consent Decree matters, multiplied by the hourly billing rate of the individual concerned.

Each produced invoice identifies the amount of fees and expenses sought for that invoice. Attached as Exhibit F is a summary of the fees and expenses sought to be recovered for each invoice. Attached as Exhibit G are the supporting Perkins Coie invoices on which the summary is based.

The identification of the Perkins Coie costs was conducted using the same conservative approach that was used for the Popham Haik costs described above. The redaction and production were done by Perkins Coie. Based on my review of the redacted and produced documents, I agree with the conservative approach taken and believe that the amounts sought are the lowest possible amounts attributable to the PRP and Consent Decree efforts.

12. For purposes of this motion, Key Tronic seeks to recover $2,512.24 in fees and expenses for the PRP work performed by Robert Bailor, an investigator. In my June Affidavit, the Bailor costs were identified as $2,462.21. The current figure reflects the total of the charges to Key Tronic as set forth on all of the Bailor invoices that were produced. The invoices reference the amounts chargeable to Key Tronic and the County and the fact that Key Tronic, in most instances, paid one-half of the invoiced amounts. On one occasion, Key Tronic paid the entire amount. The change from $2,462.21 to $2,512.24 resulted from an inadvertent failure to include one of the Bailor invoices in the June total.

Attached as Exhibit H is a summary of the invoices which total $2,512.24. Attached as Exhibit I are the Bailor invoices and Key Tronic payment records on which the summary is based.

13. For purposes of this motion, Key Tronic seeks to recover $129,447.31 in fees and expenses for the work performed by Landau Associates, Inc. relating to the negotiation of the Consent Decree and Scope of Work. In my June Affidavit, the Landau costs were identified as $126,270.53. Additional review of the documents has resulted in a higher figure.

The figure of $129,447.31 was arrived at as follows. The Landau invoices for Colbert which were produced total $133,139.08. However, Key Tronic is following the same conservative approach with respect to the Landau costs as it

has with respect to other costs. We are not now seeking recovery for two pieces of work performed by Landau which related indirectly to the Consent Decree. Subtracting the cost for those pieces of work from $133,139.08 amounts to $129,447.31.

Attached as Exhibit J is a summary of the Landau Associates, Inc. invoices which total $129,447.31. Attached as Exhibit K are the supporting Landau Associates, Inc. invoices and Key Tronic payment records on which the summary is based.

14. For purposes of this motion, Key Tronic seeks to recover $20,903.35 in fees and expenses for the work performed by Dames & Moore. In my June Affidavit, the Dames & Moore costs were identified as $22,323.09. Additional review of the documents has resulted in a lower figure.

The figure of $20,093.35 was arrived at as follows. The total amount of fees and expenses identified in the Dames & Moore produced invoices was $41,164.69, of which Key Tronic paid $21,297.75. Key Tronic received a credit from Dames & Moore of $394.40 because it had paid too much for one invoice. Subtracting the $394.40 credit from Key Tronic's payments of $21,271.75 amounts to $20,903.35. This is the amount that Key Tronic seeks to recover for the work performed by Dames & Moore.

In my deposition, I could not recall the nature of the work performed by Dames & Moore or the sequence of events leading up to our hiring of Dames & Moore. I have since reviewed the Dames & Moore documents and have refreshed my recollection. My refreshed recollection is as follows. Dames & Moore reviewed the Remedial Investigation, the Feasibility Study and the reports prepared by Maddox and Donahue which were issued prior to the Remedial Investigation and Feasibility Study. Dames & Moore analyzed the various remedial alternatives proposed in

the Remedial Investigation and Feasibility Study to determine whether the reports included the most cost-effective remedy. Dames & Moore further analyzed each alternative set forth in the RI/FS to determine whether the cost projections for each such alternative were accurate. After this work was performed, Dames & Moore then assisted Key Tronic in preparing comments to the United States and State of Washington on the RI/FS. Those comments recommended that the United States and State of Washington select the most cost-effective remedy. The United States and State of Washington ultimately selected this remedy.

Attached as Exhibit L is a summary of the Dames & Moore invoices which indicate the amounts billed and amounts paid. Attached as Exhibit M are the Dames & Moore invoices and Key Tronic payment records on which the summary is based.

15. Key Tronic is obligated to pay $4.2 million pursuant to the Consent Decree with the United States Environmental Protection Agency, Washington Department of Ecology and Spokane County. In my June Affidavit, I said that Key Tronic had paid $1.3 million pursuant to the Consent Decree. Key Tronic has now paid $2.25 million pursuant to the Consent Decree. Attached as Exhibit N is a summary of the documents reflecting the payment of $2.25 million. Attached as Exhibit O are the documents on which the summary is based.

/s/
DAVID L. POWERS

SUBSCRIBED AND SWORN to before me this 1st day of February, 1991.

Betty A. Traband /s/
NOTARY PUBLIC in and for the State of Washington, residing at Spokane.
My Commission Expires: March 15, 1994.

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

KEY TRONIC CORPORATION, a Washington corporation, Plaintiff, v. UNITED STATES OF AMERICA; THE UNITED STATES AIR FORCE; DONALD B. RICE, THE SECRETARY OF THE UNITED STATES AIR FORCE, in his official capacity; ALUMAX, INC., a Delaware corporation; ALUMAX FABRICATED PRODUCTS, INC., a Delaware corporation; and ALUMAX MILL PRODUCTS, INC., a Delaware corporation, Defendants.	CIVIL No. C-89-694-JLQ STIPULATION

WHEREAS, Key Tronic Corporation ("Key Tronic") has filed this action, pursuant to sections 107(a) and 113 of the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. §§ 9607(a) and 9613, against several defendants, including the United States, the United States Air Force, and Donald Rice, Secretary of the Air Force (hereinafter referred to jointly as "the United States") seeking to recover removal and interim remediation costs Key Tronic alleges to have incurred in connection with the remediation of the release of hazardous substances at Colbert Landfill, Spokane, Washington;

WHEREAS, the United States and Key Tronic previously executed the Consent Decree entered by this Court on January 11, 1991, in order to resolve the United States' liability to Key Tronic for certain of the claims Key Tronic has asserted;

WHEREAS, the Paragraph 3 of the Consent Decree provided that the following claims ("the excepted claims") remained in dispute between the parties:

A. Costs and fees incurred by attorneys and investigators for Key Tronic during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, Civ. No. 89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000, for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A;

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

WHEREAS, on March 19, 1991, the Court issued a decision holding that Key Tronic is entitled to recover on the excepted claims as a matter of law;

WHEREAS, the United States and Key Tronic have entered into this Stipulation to further narrow the issues in this litigation;

NOW, THEREFORE, it is agreed and stipulated that:

1. The Court shall enter judgment on the excepted claims in the amount of $155,500.

2. This agreement extends to the quantum of recovery alone; the United States preserves all rights to appeal an adverse judgment with respect to the issue of whether any or all of the excepted claims are recoverable as a matter of law.

3. Key Tronic reserves the right to seek to recover attorneys' fees incurred after June 17, 1991, and interest on the excepted claims accrued after June 17, 1991, should the United States appeal this matter.

4. Nothing in this agreement shall affect the rights or obligations of the United States or Key Tronic established in the Consent Decree with respect to any issue other than the quantum of recovery to be awarded on the specified excepted claims in paragraph 1 above.

SO AGREED:

RICHARD B. STEWART
Assistant Attorney General

/s/_____
EILEEN T. MCDONOUGH
Environmental Defense Section
U.S. Department of Justice
10th St. & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-3126

Counsel for United States

DATED: June 17, 1991

/s/_____
JAMES R. MOORE
Perkins Coie
1201 Third Avenue
40th Floor
Seattle, Washington 98101
(206) 583-8888

Counsel for Key Tronic

DATED: June 19, 1991

No. 93-376

In the

Supreme Court of the United States

KEY TRONIC CORPORATION,
Petitioner,
v.
UNITED STATES, et al.

and

STANTON ROAD ASSOCIATES.
Petitioner,
v.
LOHREY ENTERPRISES, INC., ET AL.

ORDER ALLOWING CERTIORARI
Filed December 13, 1993.

The petition herein for writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted.

December 13, 1993

Supreme Court, U.S.
FILED
JAN 26 1994
OFFICE OF THE CLERK

(6)

93-376

In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF PETITIONER

James R. Moore
Counsel of Record
Mark W. Schneider
Michael Himes
Kathryn L. Tucker
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888

Attorneys for Petitioner

42 pp

QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred to (a) prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) search for and identify other parties responsible for the contamination; and (c) litigate cost-recovery actions against other responsible parties to compel their participation in the remediation.

PARTIES

Key Tronic Corporation ("Key Tronic") and the United States were parties in the proceeding before the Ninth Circuit. Key Tronic has no parent company. All of its subsidiaries are wholly owned.

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I. OPINIONS BELOW

The opinion of the Ninth Circuit in *Key Tronic Corp. v. United States* is reported at 984 F.2d 1025 and is reprinted in Appendix A to Key Tronic's petition for certiorari ("Pet. Cert."). The opinion of the district court is reported at 766 F. Supp. 865 and is reprinted in Pet. Cert. Appendix B. The opinions of the Ninth Circuit and the district court in the companion case of *Stanton Road Associates v. Lohrey Enterprises*, 984 F.2d 1015 (9th Cir.), *cert. dismissed*, 126 L.Ed.2d 609 (1993), are reprinted in Pet. Cert. Appendices C and D.

II. JURISDICTION

The Ninth Circuit entered its judgment on January 28, 1993. On June 7, 1993, the Ninth Circuit denied Key Tronic's petition for rehearing and also denied Key Tronic's suggestion for rehearing en banc. Pet. Cert. Appendices E, F. The petition for certiorari was timely filed on September 3, 1993 and the Court has jurisdiction to review the judgment of the Court of Appeals by writ of certiorari pursuant to 28 U.S.C. § 1254(1).

III. STATUTES

This case involves the Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), as amended by the 1986 Superfund Amendments and Reauthorization Act ("SARA"). The CERCLA statute is codified at 42 U.S.C. § 9601 *et seq.*, pertinent sections of which are appended hereto.

IV. STATEMENT OF THE CASE

This case concerns the recovery of Key Tronic's costs of performing environmental cleanup measures to protect public

health and then pursuing legal action against other liable parties to enforce CERCLA's scheme of requiring all who contribute to environmental contamination to pay for its cleanup.

A. FACTUAL BACKGROUND

Spokane County operated the Colbert Landfill (the "Landfill") in Eastern Washington during the 1970s. During this period, liquid chemicals were disposed of at the Landfill by a number of entities, including Key Tronic and the United States Air Force. In the fall of 1980, the Washington Department of Ecology ("WDOE") tested drinking water wells in the area surrounding the Landfill and determined that they were contaminated by chemicals. Pet. Cert. Appendix B-2, *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 867 (E.D. Wash. 1991). Key Tronic and Spokane County jointly retained consultants to further evaluate conditions at the Landfill, including extensive well water sampling and analyses. CR 44, Ex. 15. Beginning in 1983, Key Tronic, upon advice from WDOE and the County health district, supplied bottled water to residents adjacent to the Landfill and funded installation of a new water system. *Id.*

Key Tronic acted as a responsible corporate citizen by stepping forward and publicly acknowledging that it had previously disposed of hazardous wastes at the Landfill and by taking measures to reduce the public health threat to nearby residents. CR 44, Ex. 15; J.A. 7, CR 44, Ex. 16. Other entities that had disposed of hazardous wastes at the Landfill, including the Air Force, did nothing. CR 44, Ex. 15. Key Tronic undertook the necessary investigation to identify other potentially responsible parties ("PRP"), i.e., persons potentially liable under CERCLA, to ensure that they would share the costs of the ultimate long-term cleanup. J.A. 7, CR 44, Ex. 16. Key Tronic's efforts in identifying the Air Force as a PRP and in establishing the Air Force's disposal of

hazardous wastes at the Landfill resulted in action by the Environmental Protection Agency (the "EPA") against the Air Force. Pet. Cert. Appendix B-14 n.4, *Key Tronic*, 766 F. Supp. at 872 n.4.

In addition to identifying persons responsible for the contamination, Key Tronic retained counsel and a consultant to work with the EPA and WDOE to investigate the site, develop a remedy, and draft the scope of work and consent decree that established the remediation to be performed at the Landfill. Pet. Cert. Appendix B-13-14, *Key Tronic*, 766 F. Supp. at 872; CR 44, Exs. 16, 17. After performing this work, Key Tronic and Spokane County accepted financial responsibility for the cleanup and entered into a Consent Decree (the "Consent Decree") with the EPA and WDOE setting forth the remedy to be performed. Pet. Cert. Appendix B-2, *Key Tronic*, 766 F. Supp. at 867. Apart from its own response costs of approximately $1.2 million, Key Tronic agreed to pay $4.2 million under the Consent Decree. *Id.*

In a previous action before the same district court, the district court held the Air Force liable under Washington State law for its disposal of hazardous wastes at the Landfill. J.A. 29, CR 67, at 23. Thereafter, the Air Force and the EPA in February, 1990, finalized an Interagency Agreement whereby the Air Force agreed to pay $1.45 million to implement the remedy set forth in the Consent Decree. Pet. Cert. Appendix B-2, *Key Tronic*, 766 F. Supp. at 867; J.A. 9-10.

B. PROCEDURAL BACKGROUND

Key Tronic filed its complaint against the Air Force in October 1989.[1] CR 1. Key Tronic's complaint asserted a private cost-recovery claim under CERCLA Section 107(a)(4)(B), 42 U.S.C. § 9607(a)(4)(B) (the "Section 107 claim"), and a contribution claim under CERCLA Section 113(f), 42 U.S.C. § 9613(f) (the "Section 113 claim"). The Air Force moved to dismiss both of Key Tronic's claims against it. CR 22. Key Tronic moved for partial summary judgment regarding the Air Force's liability on the Section 107 claim. CR 39.

The district court entered an order in August 1990 resolving the Air Force's motion to dismiss and Key Tronic's motion for partial summary judgment. J.A. 12, CR 67. First, as Key Tronic conceded the issue, the district court granted the Air Force's motion to dismiss the Section 113 claim (i.e., Key Tronic's claims for recovery of the $4.2 million incurred under the Consent Decree). J.A. 16-17, CR 67, at 6-7. Second, the district court denied the Air Force's motion to dismiss the Section 107 claim. J.A. 23, CR 67, at 15. Third, the district court granted Key Tronic's motion for partial summary judgment. The court held:

> Key Tronic moves for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607(a)(4)(B) for a portion of the $1.2 million in costs Key Tronic privately incurred in responding to the Colbert release.

---

[1]Key Tronic's complaint named several other defendants. During proceedings in the district court, defendant William Schmidt was dismissed, J.A. 29, CR 67 at 23, and the Alumax defendants settled. Pet. Cert. Appendix B-4, *Key Tronic*, 766 F. Supp. at 868.

> This court has previously held that the USAF disposed of hazardous waste at Colbert. (Oral Findings of Fact and Conclusions of Law, *Key Tronic Corp. v. United States*, C-88-041-JLQ and C-87-20-JLQ (E.D. WA, Nov. 3, 1989), p. 2; Ex. 1 to Plaintiff's Statement of Facts.) This fact establishes the USAF as a "person who . . . arranged for disposal or treatment . . . of hazardous substances owned or possessed by such person . . ." 42 U.S.C. § 9607(a)-(3). It is undisputed that Colbert is a "facility" within the definition of 42 U.S.C. § 9601(9), and that a "release" has occurred at Colbert within the definition of 42 U.S.C. § 9601(22). Thus, under 42 U.S.C. § 9607 (a)-(4)(B), the USAF is liable for a portion of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." Key Tronic's motion for partial summary judgment that the USAF is liable under 42 U.S.C. § 9607 should be granted.

J.A. 30, CR 67, at 23-24.

In light of these rulings, the Air Force and Key Tronic subsequently negotiated the amounts to be paid on Key Tronic's Section 107 response costs of approximately $1.2 million. First, the parties partially settled the Air Force's liability when the Air Force executed a consent decree providing for payment of $185,000 to Key Tronic on two categories of costs (well contamination investigation and provision of alternative water supplies), but reserved the remaining categories of costs (the "excepted claims"). CR 92. The excepted claims concerned (1) prelitigation costs and attorneys' fees for identifying PRPs, (2) prelitigation costs and attorneys' fees for work on the Consent Decree,

(3) attorneys' fees incurred in prosecuting this action, and (4) prejudgment interest on the excepted claims. Pet. Cert. Appendix B-3, *Key Tronic*, 766 F. Supp. at 867. The district court later ruled that all the "excepted claims" costs were recoverable as response costs in this action. Pet. Cert. Appendix B-6-14, *Key Tronic*, 766 F. Supp. at 869-72. Second, after that ruling, the Air Force reserved its right to appeal and stipulated that it would pay $155,000 on the excepted claims so that a final judgment could be entered. J.A. 43, CR 134.[2] Judgment was entered on July 1, 1991. CR 137, 138. The Air Force appealed from all excepted claims, except prejudgment interest, and the Ninth Circuit reversed. Pet. Cert. Appendix A, *Key Tronic*, 984 F.2d 1025.

V. SUMMARY OF ARGUMENT

CERCLA Section 107(a), 42 U.S.C. § 9607(a), expressly provides a right of action to any person to recover costs incurred in implementing CERCLA from any other liable person, including States and the United States. A

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[2]The stipulation excepted the following claims for appeal:

A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;

B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A.

C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action; and

D. Prejudgment interest on excepted claims.

person bringing such a cost-recovery action is entitled to recover its "response" costs, which CERCLA Section 101(25), 42 U.S.C. § 9601(25), defines to include costs of "enforcement activities." The plain language of the statute thus expressly permits any party to recover its "enforcement activities" costs in a Section 107(a) cost-recovery action. CERCLA's language and structure reveal that the words "enforcement activities" have no reasonable meaning other than to include attorneys' fees.

These express statutory provisions support CERCLA's two overriding goals: (a) encouraging all persons, including private persons, States, and Indian tribes, to respond to pollution and to clean up hazardous waste sites, and (b) holding liable all persons responsible for damage to the environment.

Under the American Rule, a prevailing party in litigation is not entitled to attorneys' fees absent a recognized ground in equity or statutory authorization for an award of fees. *Runyon v. McCrary*, 427 U.S. 160, 185 (1976); *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 260 (1975). No magic words are required to provide for fees; to authorize the award of attorneys' fees Congress need only use language that evinces its intent that attorneys' fees are to be awarded. The amendment of the definition of "response" in 1986 to include costs of "enforcement activities" shows such an intent by expressly providing for an award of attorneys' fees to persons who enforce CERCLA. The Ninth Circuit erred in failing to award fees to Key Tronic.

VI. ARGUMENT

A. THE CERCLA STATUTE

CERCLA provides an express right of action to any person who has incurred costs to clean up a hazardous waste

site to recover those costs from any other person liable under CERCLA. Section 107(a)(4)(A) and (B) provide:

> Covered persons . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan . . . .

42 U.S.C. § 9607(a)(4)(A) and (B).[3]

CERCLA defines "response" as follows:

> The terms "respond" or "response" means [sic] remove, removal, remedy, and remedial action, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. § 9601(25) (emphasis added). The underscored language was added by the 1986 SARA amendments. Thus, the definition of "response" in Section 101(25), as amended by SARA, plainly applies to actions brought to recover "necessary costs of *response*" under Section 107(a)(4)(B) (emphasis added). There is no dispute that Section 101(25), a definitional section, applies to Key Tronic's private cost-recovery action under Section 107(a)(4)(B).

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[3]The district court ruled that the Air Force is a "covered person" liable under Section 107(a) and accordingly granted Key Tronic's motion for partial summary judgment on liability. J.A. 30, CR 67, at 23-24. The Air Force did not appeal from this ruling.

Congress provided an express right of action in Section 107(a) to all persons who implement CERCLA in order to further CERCLA's aims:

> CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.

H.R. Rep. No. 99-253 (III), 99th Cong., 2d Sess. 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038. *See also Mardan Corp. v. C.G.C. Music, Ltd.*, 804 F.2d 1454, 1455 (9th Cir. 1986) ("[CERCLA's] purpose was to ensure the prompt and effective cleanup of waste disposal sites, and to assure that parties responsible for hazardous substances bore the cost of remedying the conditions they created.") (citing statement of Rep. Florio, 126 Cong. Rec. 31,964 (1980)).

CERCLA's express right of action under Section 107(a) is designed to encourage prompt cleanups by providing for recovery of response costs to all persons willing and able to shoulder the costs of cleanups. That CERCLA encourages all persons to implement CERCLA's goals is hardly surprising given the enormity of the task of cleaning up the thousands of hazardous waste sites across our land. *See* H.R. Rep. No. 99-253(I), 99th Cong. 2d Sess., pt. 1, at 55, *reprinted in* 1986 U.S. Code Congressional and Administrative News ("U.S.C.C.A.N.") 2835, 2837 (noting tens of thousands of sites needing cleanup and stating that "EPA will never have adequate monies or manpower to address the problem itself. As a result, an underlying principle of H.R. 2817 is that Congress must facilitate cleanups of hazardous substances by

the responsible parties while assuring a strong EPA oversight role with a set of tough legal enforcement standards.").[4]

The Court has also noted CERCLA's goals:

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Pennsylvania v. Union Gas Co., 491 U.S. 1, 21-22 (1989) (plurality opinion).

B. "ENFORCEMENT ACTIVITIES" MEANS ATTORNEYS' FEES.

Given Section 101(25)'s plain language—providing that "enforcement activities" are to be recovered as costs of response for actions brought under Section 107(a)—the Court must determine whether Congress, by providing for the recovery of response costs, including costs of "enforcement activities," intended parties to recover attorneys' fees as costs of response under Section 107(a). Key Tronic submits that "this language [enforcement

[4]H.R. 2817 was the predecessor bill to the bill passed and enacted as SARA, Pub. L. 99-499. *See* 1986 U.S.C.C.A.N. 2835.

activities] must mean that private plaintiffs can recover the attorneys' fees expended in enforcing the liabilities that CERCLA imposes on polluters." Pet. Cert. Appendix C-16, *Stanton Road*, 984 F.2d at 1023 (Canby, J., dissenting).

The United States regularly seeks and recovers attorneys' fees when *it* brings a Section 107 cost-recovery action; and the courts have accepted that "enforcement activities" necessarily means, and provides for the recovery of, attorneys' fees when the United States brings suit. *See, e.g., United States v. Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) (relying on Section 101(25) to support award of attorneys' fees to the EPA in a cost-recovery action under 42 U.S.C. § 9607(a)); *United States v. Mexico Feed & Seed Co.*, 729 F. Supp. 1250, 1253-54 (E.D. Mo. 1990) (permitting United States to amend complaint to pray for costs of "enforcement activities" in a cost-recovery action under 42 U.S.C. § 9607(a)).

The United States itself argued to the Ninth Circuit in this case that "enforcement activities" includes attorneys' fees when the United States brings a cost-recovery action. Brief of United States at 13, *Key Tronic v. United States*, Ninth Circuit No. 91-36021, (filed on January 31, 1992) ("It is statutorily established that attorneys' fees incurred by the United States in seeking a remedial action or recovering costs under the Act are recoverable as response costs authorized by the Act, 42 U.S.C. 9604(b) *& 9601(25).*") (emphasis added). Key Tronic submits that if "enforcement activities" means attorneys' fees when the United States brings a Section 107(a) cost-recovery action, it must have the same meaning for other persons.

The United States argued to the Ninth Circuit that "enforcement activities" provides for attorneys' fees for the simple reason that there is no other reasonable meaning. As Judge Canby stated:

When Congress amended CERCLA to permit such private litigants, among others, to recover the "costs" of "enforcement activities," it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. The "enforcement" of CERCLA by a private party consists in suing to hold the polluter liable. The lion's share of the enforcement cost, as opposed to cleanup cost, will lie in attorneys' fees. Congress cannot have been ignorant of that fact. A private party simply cannot recover its cost of enforcement if it cannot recover its attorneys' fees. If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable.

Pet. Cert. Appendix C-17, *Stanton Road*, 984 F.2d at 1023 (Canby, J. dissenting). *Accord General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990) ("Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover."), *cert. denied*, 499 U.S. 937 (1991); *Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.) (same), *cert. denied*, 126 L. Ed. 2d 594 (1993). Neither the language of the statute nor its history support any other reasonable interpretation.

Under CERCLA as originally enacted in 1980, the courts concluded that the United States was provided statutory authority to recover its attorneys' fees for enforcing the CERCLA liability scheme. *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1984) (under 42 U.S.C. § 9604(b)(1), United States

receives attorneys' fees for bringing Section 107 action), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989); *United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984)(same), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987). The SARA amendment to Section 101(25), facially applying to cost-recovery actions brought under both Section 107(a)(4)(*A*) and Section 107(a)(4)(*B*), is rendered superfluous if construed to provide for the recovery of attorneys' fees only in favor of the United States, because the United States was awarded attorneys' fees prior to the 1986 amendment to Section 101(25).[5] Such an interpretation "violates [a] cardinal rule of statutory interpretation that no provision should be construed to be entirely redundant." *Kungys v. United States*, 485 U.S. 759, 778 (1988). See also *Hastings Building Products, Inc. v. National Aluminum Corp.*, 815 F. Supp. 228, 232-33 (W.D. Mich. 1993) ("[B]efore the 1986 amendments, § 9604(b)(1) provided for the recovery of costs by the government. Therefore, the conclusion that the phrase 'enforcement costs' has no relevance to private parties assumes that Congress expended effort to alter § 9601(25) in 1986 with the intent of creating a redundant provision. This seems improbable.").

C. ENFORCEMENT ACTIVITIES ARE NOT LIMITED TO THE UNITED STATES.

Recognizing that the term "enforcement activities" encompasses attorneys' fees, and that Section 101(25) facially applies to private cost-recovery actions brought under Section 107(a)(4)(B), the United States contends that Section 101(25) has a limit not found in its plain and

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[5]Key Tronic is unaware of any court, either before or after SARA, that has refused attorneys' fees to the United States when it brings a Section 107(a) action.

unambiguous language. The United States contends that recovery of costs of "enforcement activities" is limited to recovery by the United States. This argument should be rejected.

The plain language of CERCLA, 42 U.S.C. § 9601(25) and § 9607(a), provides that a private person bringing a cost-recovery action under Section 107(a)(4)(B) (as well as an Indian tribe, a State *and* the United States government bringing a cost-recovery action under Section 107(a)(4)(A)) may recover costs of "enforcement activities." Thus, Section 101(25), permitting recovery of costs of "enforcement activities" as "response" costs, plainly and unambiguously applies to all persons who seek to recover response costs under Section 107(a).

If the United States' argument were correct, Congress would have limited the definition of "enforcement activities" to the United States. Congress did not do so. The United States' argument that Congress intended that it alone would recover attorneys' fees as costs of "enforcement activities" is belied by the plain language of the statute.

To avoid Section 101(25)'s plain language, the United States contends that SARA's legislative history reveals Congress' intent that only the United States is entitled to recover "enforcement activities" costs under Section 107(a). In this regard, the House Committee on Energy and Commerce commented that SARA's amendment of Section 101(25) "will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49. The United States contends that this passage suggests, by negative implication, that *only* the EPA may recover costs of enforcement activities under Section 107(a).

The subsequent Conference Committee Report contains no such negative inference:

> The House amendment proposes to modify CERCLA section 101(25), which is the definition of "response," to expli- citly include enforcement activities.
>
> . . .
>
> The conference substitute adopts the House proposal. This amendment clarifies and confirms that such costs [i.e., enforcement costs] are recoverable from responsible parties, as removal or remedial costs under section 107.

H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278. The legislative history from the conference committee that reported the final bill passed and enacted thus contains no limiting reference to the EPA. *Accord* H.R. Rep. No. 99-253(V), 99th Cong., 2d Sess., pt. 1, at 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129 ("[The change to § 101(25)] amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs.").

In any event, resorting to a single piece of legislative history to support a proffered interpretation of Section 101(25), through negative implication, fails to address the plain language of Section 101(25). The proffered limitation of Section 101(25) should be rejected as contrary to the statute's plain and unambiguous language. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) ("The plain meaning of legislation should be

conclusive, except in the 'rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters.'") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982)).

D. PRIVATE PARTIES ENFORCE CERCLA.

Alternatively, the United States contends that Section 101(25)'s provision for recovery of "enforcement activities" costs applies only to the United States because only the United States can "enforce" CERCLA. That is patently untrue. The plain language of the statute provides that *all* persons who bring cost-recovery actions do so under Section 107(a)(4)(A) or (B) and that persons who bring an action under (B) are entitled to costs of "enforcement activities."

Like the United States, a private person, an Indian tribe or a State "enforces" statutory rights and "enforces" CERCLA's scheme by incurring costs to clean up hazardous waste sites and in bringing suit to effect CERCLA's policy that the costs of cleanup be borne by polluters. This is, indeed, the natural and commonplace understanding of the term "enforce," heard daily by attorneys and putative wrongdoers from aggrieved persons who vow to "enforce" their rights. Likewise, it is commonplace to hear attorneys and non-attorneys alike claim the existence of an "enforceable contract," i.e., a contract that a court will *enforce* in the context of *private* litigation. See also Webster's Ninth New Collegiate Dictionary 412 (1987) ("enforce" means: (1) to give force to: strengthen, (2) to urge with energy, (3) constrain, compel, (4) to effect or gain by force, (5) to carry out effectively).

In accord with both the common understanding of "enforce," and with its dictionary definition, the Court has stated that an express statutory right of action provides the

"vehicle for private enforcement" of the laws. *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986) (discussing private right of action in context of antitrust laws). *See also Alyeska*, 426 U.S. at 263 (noting that statutes providing for award of fees generally suggest that Congress has "opted to rely heavily on private *enforcement* to implement public policy....") (emphasis added).

Further, private parties and the EPA engage in the same activities regardless of who enforces CERCLA. The EPA may investigate potentially responsible parties with respect to contamination at a CERCLA site, investigate and develop appropriate remedial actions, and pursue legal action to have responsible parties held liable for such response costs. 42 U.S.C. § 9604. All these activities constitute "enforcement" if performed by the EPA; they are activities necessary to "enforce" the liabilities and responsibilities created by CERCLA. If, however, a responsible party implements CERCLA, a private party, rather than the EPA, will undertake the same enforcement activities that the EPA otherwise might have performed. This is to be encouraged, as the EPA alone is unable to respond to the thousands of sites awaiting cleanup. *See Union Gas*, 491 U.S. at 21-22. The enforcer of CERCLA — whether the EPA or a private party — does not determine whether an activity is an "enforcement activity" within the meaning of Section 101(25); rather, the *nature* of the activity controls. CERCLA provides that Congress intended private parties *and* the EPA to do the same things: promptly clean up hazardous waste sites and later recover the costs of such cleanups from other responsible persons.

In this case, Key Tronic implemented CERCLA's goal of cleaning up contamination when it paid to address problems caused by pollution at the Landfill. Likewise, Key Tronic furthered CERCLA's goal of requiring polluters to pay when it retained experts and attorneys to (1) investigate

persons responsible for that pollution, (2) negotiate and draft the Consent Decree setting forth the ultimate cleanup plan, and (3) bring this Section 107(a) action. Key Tronic "urged with energy," "compelled," and "carried out effectively" CERCLA's express goals. In short, Key Tronic "enforced" CERCLA.[6] Any other reading thwarts Congress' express intent that CERCLA be enforced by the United States and others, including States, Indian tribes or any other person, and ignores Congress' plain language in providing that *all* such persons are authorized to recover costs of "enforcement activities."

E. ATTORNEYS' FEES—THE AMERICAN RULE

The prevailing party in an action may not recover its attorneys' fees absent a recognized ground in equity or statutory authorization for an award of fees. *Runyon*, 427 U.S. at 185-86; *Alyeska*, 421 U.S. at 260. Congress is not restricted to using "magic words" to clearly manifest its intent that attorneys' fees be awarded.

In *Union Gas*, 491 U.S. 1, the Court considered whether Congress intended to subject the States to suit in federal court for liability under CERCLA. Because Congress' abrogation of the States' immunity from suit implicates important issues of federalism, Congress must employ "unmistakably clear language" to abrogate the States' Eleventh Amendment immunity. *Welch v. State Department of Highways & Public Transportation*, 483 U.S. 468, 478 (1987). See also *Quern v. Jordan*, 440 U.S. 332, 345 (1979) (no abrogation when statute failed "explicitly and by clear

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[6]*General Elec.*, 920 F.2d at 1422 (private cost-recovery action under Section 107(a)(4)(B) is "enforcement activity"); *Cadillac Fairview/Cal., Inc. v. Dow Chem. Co.*, 840 F.2d 691, 694 (9th Cir. 1988) (same); *Wickland Oil Terminals v. Asarco, Inc.*, 792 F.2d 887, 892 (9th Cir. 1986) (same).

language [to] indicate on its face an intent to sweep away the immunity of the States").

Notwithstanding that CERCLA does not use the words "Eleventh Amendment," "abrogate" or "immunity," the Court examined the language and structure of CERCLA to determine whether Congress nevertheless intended to abrogate Eleventh Amendment immunity. After reviewing CERCLA's language and structure, in conjunction with the SARA amendments, the Court held that Congress clearly intended to abrogate the States' Eleventh Amendment immunity. *Union Gas*, 491 U.S. at 13, 30. In this regard, the Court stated: "If no magic words are required for abrogation [of Eleventh Amendment immunity], then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language." *Id.* at 13 n.4.

If no "magic words" are needed to meet the rigorous standards applicable to abrogation of Eleventh Amendment immunity, certainly no "magic words" are necessary for Congress to authorize an award of fees. As discussed above, Congress' amendment of the definition of "response" to include costs of "enforcement activities" has no reasonable meaning other than to authorize an award of attorneys' fees. Thus, the language and structure of CERCLA, as amended by SARA, reveal that Key Tronic may recover its attorneys' fees in this action.

The Ninth Circuit agreed that attorneys' fees are "ordinarily expended in a private response action." Pet. Cert. Appendix C-9, *Stanton Road*, 984 F.2d at 1020. The Ninth Circuit held, however, that Section 107(a)(4)(B)'s provision for the recovery of "necessary costs of response" did not explicitly provide for the recovery of attorneys' fees under *Runyon* and *Alyeska*. Pet. Cert. C-7, *Stanton Road*, 984 F.2d at 1019. *Accord FMC Corp. v. Aero Industries, Inc.*, 998

F.2d 842, 847 (10th Cir. 1993); *In re Hemingway Transport, Inc.*, 993 F.2d 915, 935 (1st Cir.), *cert. denied*, 114 S. Ct. 303 (1993).

The Ninth Circuit's holding was predicated upon an application of *Alyeska* and *Runyon* that fails to acknowledge the difference in the specificity of the language of the statutes in those cases with the language of CERCLA and fails to acknowledge that no "magic words," *Union Gas*, 491 U.S. at 13 n.4, are required to conclude that Congress intended attorneys' fees to be recovered.

In *Alyeska*, the prevailing litigant secured relief in the district court for violations of 30 U.S.C. § 185 and 42 U.S.C. § 4321 *et seq. Alyeska*, 421 U.S. at 242-43. Although neither 30 U.S.C. § 185 nor 42 U.S.C. § 4321 provided any language remotely suggesting an award of fees to a prevailing party, and no alternative statutory authorization for an award of fees existed, the D.C. Circuit nonetheless held that fees were recoverable because the plaintiffs had vindicated "important statutory rights of all citizens." 421 U.S. at 245. After extensive review of the history of the American Rule, the Court reversed and held that attorneys' fees ordinarily may be awarded only when Congress has specifically provided for their recovery. *Id.* at 269-71.

In *Runyon*, the plaintiffs successfully sued for relief from racial discrimination under 42 U.S.C. § 1981, and the district court awarded attorneys' fees. 427 U.S. at 166. Following *Alyeska*, the Fourth Circuit reversed the award of fees. The petitioners argued to the Court that the fees were properly awarded under *Alyeska* because 42 U.S.C. § 1988 authorizes the federal courts "to furnish suitable remedies" for violations of a person's civil rights. 427 U.S. at 184.

The Court rejected this argument because:

> [N]othing in the legislative history of that statute [42 U.S.C. § 1988] suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended.

Runyon, 427 U.S. at 185. The Court accordingly held:

> the law of the United States, but for a few well-recognized exceptions not present in these cases, has always been that absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation. Hence in order to "furnish" an award of attorneys' fees, we would have to find that at least as to cases brought under statutes to which § 1988 applies, Congress intended to set aside this long-standing American rule of law. *We are unable to conclude, however, from the generalized commands of § 1988, that Congress intended any such result.*

Id. at 185-86 (emphasis added).

In contrast to the complete absence of language evidencing Congress' intent that fees be recovered under the statutes in *Runyon* and *Alyeska*, Section 101(25) explicitly provides that persons bringing suit under Section 107(a) are entitled to recover the costs of "enforcement activities." This language is vastly different from the statutes at issue in *Runyon* and *Alyeska*. No "magic words," *Union Gas*, 491 U.S. at 13 n.4, or "particular linguistic formula," Pet. Cert. Appendix C-18, *Stanton Road*, 984 F.2d at 1024 (Canby, J., dissenting), are required to reveal Congress' intent that attorneys' fees are recoverable response costs under Section 107(a). Because there is no reasonable interpretation

of "enforcement activities" other than one that includes attorneys' fees, the Ninth Circuit erred when it failed "to give fair and reasonable meaning to the text of the United States Code, adopted by various Congresses at various times." *Union Gas*, 491 U.S. at 30 (Scalia, J., concurring in part and dissenting in part).[7]

The Ninth Circuit also supported its reasoning by referring to CERCLA Section 310, 42 U.S.C. § 9659, which provides for the recovery of "attorney fees" to citizens suit plaintiffs. The Ninth Circuit concluded that CERCLA's disparity in language, "attorney fees" under 42 U.S.C. § 9659 versus "response" costs and costs of "enforcement activities" under Section 107(a), suggested that attorneys' fees are not recoverable in a Section 107(a) action.[8] Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1018. This argument is unpersuasive for three reasons.

First, the citizens suit provision authorizes a citizen to bring an action to correct certain CERCLA violations or to remedy a failure on the part of the EPA to perform a non-discretionary duty. 42 U.S.C. § 9659(a). The citizens suit provision allows for the imposition of civil penalties, but

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[7]The Ninth Circuit also erroneously concluded that the provision for attorneys' fees was not sufficiently explicit under *Runyon* and *Alyeska* because courts had split on this issue. Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1019. First, the courts in accord with the Ninth Circuit's holding that fees are not recoverable have employed analyses similar to the Ninth Circuit's flawed analysis. Second, this argument held true with respect to whether CERCLA abrogated the Eleventh Amendment; yet such a "'judicial headcount' is, of course, not dispositive." *Union Gas*, 491 U.S. at 46-47 (White, J., concurring in part and dissenting in part).

[8]The Ninth Circuit's decision creates the rather strange inconsistency of allowing fees to citizens suit plaintiffs who seek to further CERCLA's goals by having someone else pay for a cleanup, but *not* allowing fees to persons like Key Tronic who actually step up to the line and pay for a cleanup.

not the recovery of response costs. 42 U.S.C. § 9659(c). Because a citizens suit plaintiff could not recover fees as "response" costs, Congress provided in 42 U.S.C. § 9659(f) for the recovery of "attorney fees" in order to authorize the recovery of fees under *Runyon* and *Alyeska*.

Second, "enforcement activities" encompasses a broader meaning than "attorneys' fees." One of the statutory provisions relied upon by the United States for an award of fees, 42 U.S.C. § 9604(b)(1), authorizes it to recover its costs of "legal . . . studies," a more expansive term than "attorneys' fees." In the CERCLA context, the need for attorneys to expend time and effort, particularly to identify other potentially responsible persons, arises long before litigation begins. Without providing a more expansive term for recovering attorneys' fees, such as "enforcement activities" or "legal . . . studies," prelitigation attorneys' fees incurred to enforce CERCLA might not be recoverable under the litigation-bound analysis of *Alyeska* and *Runyon*. Thus, the more expansive terms, providing for recovery of costs of "enforcement activities" and "legal . . . studies," bring these prelitigation fees within their meaning.

Third, CERCLA nowhere provides for a recovery of fees to the United States by using the words "attorneys' fees." In *Stanton Road*, the Ninth Circuit, however, stated that the United States may recover its fees when bringing a Section 107(a) cost-recovery action pursuant to 42 U.S.C. § 9604(b)(1)'s provision for recovery of costs of "legal . . . studies." Pet. Cert. Appendix C-7, *Stanton Road*, 984 F.2d at 1019. That the Ninth Circuit understood that the United States may recover attorneys' fees under the rubric "legal . . . studies" costs, instead of "attorneys' fees," underscores the Ninth Circuit's erroneous reading of CERCLA and *Runyon*. The different wording illustrates that (a) Congress is *not* required to employ particular words to evidence its intent that fees be recovered, and (b) different wording, "legal . . .

studies" and "enforcement activities" costs versus "attorneys' fees," was employed to allow a more expansive recovery of attorneys' fees, including fees incurred outside of actual litigation, to persons who incur costs in cleaning up hazardous waste sites.

An award of attorneys' fees, specifically provided for as costs of "enforcement activities," is also fully consistent with and furthers CERCLA's purpose of promoting prompt cleanup of the environment and protection of public health. Key Tronic stepped forward and paid more than its fair share of response costs. It then incurred significant costs in enforcing CERCLA's scheme of requiring all polluters to pay. A ruling that attorneys' fees are recoverable encourages prompt cleanups, because persons are more likely to volunteer to act promptly to clean up hazardous waste sites if they are able to recover from other liable parties a portion of all response costs, including costs of enforcing CERCLA's liability scheme.

A ruling denying attorneys' fees, however, defeats CERCLA's goal of encouraging prompt cleanups. Such a ruling strongly discourages parties from responding to contamination; without the ability to recover attorneys' fees for enforcing CERCLA's liability scheme, a party otherwise willing and able to clean up a polluted site will be less likely to do so. Such a party may wait for others to do the work because it does not wish to bear the substantial expense of enforcing CERCLA. In that event, no work will be done on a site because there will be no volunteers. A ruling that attorneys' fees are not recoverable as "enforcement activities" will discourage volunteers and thwart prompt cleanups. Such a ruling would frustrate, not further, Congress' express intent of having persons, including private persons, promptly clean up the vast number of hazardous waste sites across the nation. As stated by the Sixth Circuit:

> "By providing private parties with a federal cause of action for the re- covery of necessary expenses in the cleanup of hazardous wastes, Congress intended § 107 as a powerful incentive for these parties to expend their own funds initially without waiting for the responsible persons to take action. The court can conceive of no surer method to defeat this purpose than to require private parties to shoulder the financial burden of the very litigation that is necessary to recover these costs."

Donahey, 987 F.2d at 1256 (quoting *Bolin v. Cessna Aircraft Co.*, 759 F. Supp. 692, 710 (D. Kan. 1991)); *General Elec.* 920 F.2d at 1422 (CERCLA's purpose of ensuring prompt cleanup and imposition of cleanup costs on responsible parties would be undermined if polluters did not pay litigation costs).

VII. ATTORNEYS' FEES ARE OTHERWISE RECOVERABLE.

For two additional reasons, attorneys' fees are recoverable even if the Court concludes that they are not authorized as "enforcement activities" under Section 107(a). First, a party who incurs costs, including attorneys' fees, in bringing about a common benefit is entitled to recover those costs from the persons benefited. *See, e.g., Alyeska*, 421 U.S. at 257-58 (noting common fund exception to American Rule); *Hall v. Cole*, 412 U.S. 1, 5-7 (1973) (noting common benefit exception to American Rule). Someone must bear the transaction costs in implementing CERCLA. When one party, among several statutorily liable persons, bears the costs, including attorneys' fees, associated with designing and negotiating the cleanup of a polluted site, identifying the persons responsible for the pollution, and spreading those

costs among the persons liable, a common benefit is conferred on all liable parties. This common benefit should be recoverable.

Second, even if attorneys' fees are not recoverable under the common benefit exception to the American Rule, attorneys' fees incurred prior to litigation should be recoverable as response costs irrespective of the American Rule. In *FMC Corp.*, 998 F.2d at 847-48, the Tenth Circuit concluded that *Alyeska* and *Runyon* barred recovery of attorneys' fees arising from private cost-recovery *litigation* under Section 107(a)(4)(B). The Tenth Circuit held, however, that *non*litigation attorneys' fees are recoverable:

> We reach a different legal conclusion, however, with respect to nonlitigation attorneys fees. Such fees do not fall under the American rule set out in *Alyeska* and *Runyon* because they are not incurred in pursuing litigation. Accordingly, recovery of these fees is not barred as a matter of law. Rather, the issue is whether nonlitigation attorneys fees are necessary response costs within the meaning of section 9607(a)(4)(B).
>
> . . . .
>
> . . . Plaintiffs seek recovery of the nonlitigation attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA. For example, plaintiffs submitted affidavits to the district court evidencing fees paid for negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring work progress. We cannot say as a matter of law that, under the circumstances here, none of these nonlitigation attorneys fees were necessary response costs.

Id.

While Key Tronic urges the Court to hold that it is entitled to all attorneys' fees, not just nonlitigation fees, Key Tronic requests in the alternative that the Court adopt the Tenth Circuit analysis. The Air Force stipulated to pay $155,000 of the following amounts on the excepted claims:

> A. Costs and fees incurred by attorneys and investigators for Key Tronic in the amount of $365,649 during Key Tronic's search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of the Consent Decree between Key Tronic, the United States, and the State of Washington in *The State of Washington v. County of Spokane*, CS-89-033-RJM;
>
> B. The salary of David Powers, Key Tronic's General Counsel and Secretary, in the amount of $70,000 for time spent supervising the search for additional potentially responsible parties and negotiating the Consent Decree identified in A.
>
> C. Attorneys' fees and costs incurred by Key Tronic in the prosecution of this action.

Pet. Cert. Appendix B-3, *Key Tronic*, 766 F. Supp. at 867. If the Court adopts the Tenth Circuit approach, the Court

should remand for entry of a modified award under the stipulation.

VIII. CONCLUSION

For the reasons stated, the judgment of the Ninth Circuit should be reversed. The Court should reverse the judgment of the Ninth Circuit and remand with instructions to (1) reinstate the district court judgment, (2) award fees and costs on appeal, and (3) calculate interest on the district court judgment.

PERKINS COIE

By
James R. Moore
Counsel of Record
Mark W. Schneider
Michael Himes
Kathryn L. Tucker

Attorneys for
Key Tronic
Corporation

PERTINENT PROVISIONS OF 42 U.S.C. § 9601 ET SEQ.

§ 9601. Definitions

For purposes of this subchapter—

. . .

(25) The terms "respond" or "response" means remove, removal, remedy, and remedial action, all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

§ 9607. Liability

(a) **Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date**

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incineration vessel

owned or operated by another party or entity and containing such hazardous substances, and

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incineration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

> (A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;
>
> (C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and
>
> (D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

§ 9659. Citizens suits

(a) Authority to bring civil actions

Except as provided in subsections (d) and (e) of this section and in section 9613(h) of this title (relating to timing

of judicial review), any person may commence a civil action on his own behalf—

> (1) against any person (including the United States and any other governmental instrumentality or agency, to the extent permitted by the eleventh amendment to the Constitution) who is alleged to be in violation of any standard, regulation, condition, requirement, or order which has become effective pursuant to this chapter (including any provision of an agreement under section 9620 of this title, relating to Federal facilities); or
>
> (2) against the President or any other officer of the United States (including the Administrator of the Environmental Protection Agency and the Administrator of the ATSDR) where there is alleged a failure of the President or of such other officer to perform any act or duty under this chapter, including an act or duty under section 9620 of this title (relating to Federal facilities), which is not discretionary with the President or such other officer.

Paragraph (2) shall not apply to any act or duty under the provisions of section 9660 of this title (relating to research, development, and demonstration).

. . .

(c) Relief

The district court shall have jurisdiction in actions brought under subsection (a)(1) of this section to enforce the

standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title), to order such action as may be necessary to correct the violation, and to impose any civil penalty provided for the violation. The district court shall have jurisdiction in actions brought under subsection (a)(2) of this section to order the President or other officer to perform the act or duty concerned.

(d) Rules applicable to subsection (a)(1) actions

(1) Notice

No action may be commenced under subsection (a)(1) of this section before 60 days after the plaintiff has given notice of the violation to each of the following:

(A) The President.

(B) The State in which the alleged violation occurs.

(C) Any alleged violator of the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

Notice under this paragraph shall be given in such manner as the President shall prescribe by regulation.

(2) Diligent prosecution

No action may be commenced under paragraph (1) of subsection (a) of this section if the President has commenced and is diligently prosecuting an action under this chapter, or under the Solid Waste Act [42 U.S.C.A. § 6901 et seq.] to require compliance with the standard, regulation, condition, requirement, or order concerned (including any provision of an agreement under section 9620 of this title).

(e) Rules applicable to subsection (a)(2) actions

No action may be commenced under paragraph (2) of subsection (a) of this section before the 60th day following the date on which the plaintiff gives notice to the Administrator or other department, agency, or instrumentality that the plaintiff will commence such action. Notice under this subsection shall be given in such manner as the President shall prescribe by regulation.

(f) Costs

The court, in issuing any final order in any action brought pursuant to this section, may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate. The court may, if a temporary restraining order or preliminary injunction is sought, require the filing of a bond or equivalent security in accordance with the Federal Rules of Civil Procedure.

Supreme Court, U.S.
FILED
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No. 93-376

In the Supreme Court of the United States

OCTOBER TERM, 1993

KEY TRONIC CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
EILEEN T. MCDONOUGH
Attorneys

Department of Justice
Washington, D.C. 20530
(202) 514-2217

39 pp

QUESTION PRESENTED

Whether the provision in Section 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act, 42 U.S.C. 9607(a), that allows a private party to recover the "costs of response" to pollution at designated sites, implicitly authorizes the recovery of attorney fees.

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A5) is reported at 984 F.2d 1025. The opinion of the district court (Pet.App. B1-B15) is reported at 766 F. Supp. 865. A related opinion of the district court (J.A. 14-39) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on January 28, 1993. A petition for rehearing was denied on June 7, 1993. Pet. App. E1. The petition for a writ of certiorari was filed on September 7, 1993, and was granted on December 13, 1993.[1] The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

[1] The petition for a writ of certiorari also sought review of the related case of *Stanton Road Associates* v. *Lohrey Enterprises*,

STATUTORY PROVISIONS INVOLVED

The appendix, *infra*, sets forth the text of Sections 101(25) and 107(a) of the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), as amended in 1986 by the Superfund Amendments and Reauthorization Act of 1986, 42 U.S.C. 9601(25) and 9607(a).

STATEMENT

1. This case involves the Colbert Disposal Site in Spokane County, Washington. During the 1970's, the operator of that site disposed of hazardous waste it accepted from several parties, including both petitioner and the United States Air Force. After the Washington Department of Ecology (WDOE) discovered in 1980 that water wells near the site were contaminated, and after various neighbors of the site sued petitioner,[2] petitioner began to investigate the extent of the contamination and took some initial steps in response. WDOE and

984 F.2d 1015 (9th Cir. 1993), *reprinted in* Pet. App. C1-C20. On December 16, 1993, the Clerk of the Court, upon receipt of a joint stipulation, dismissed the writ of certiorari as to *Stanton Road* pursuant to Rule 46.1 of this Court. 114 S. Ct. 652.

[2] After a jury trial, those parties secured a judgment against petitioner and the County in which the site was located for $384,777.99, which was affirmed on appeal. See *Wilson* v. *Key Tronic Corporation*, 701 P.2d 518, 528-529 (Wash. Ct. App. 1985). When petitioner sought to recover some of its share of those costs from the United States, a federal district court concluded that petitioner was responsible for 90% of the contamination, and hence held that the obligation of the United States was limited to 10% of the sum for which petitioner was held liable in the *Wilson* case. *Key Tronic Corporation* v. *United States*, No. C-87-20-JLQ (E.D. Wash. Nov. 7, 1989) (Clerk's Record item 40, Exhibit 1).

the federal Environmental Protection Agency (EPA) also took action. By December 1987, the regulatory agencies had expended a total of more than $900,000 in responding to contamination at the site. To recover those costs, the agencies instituted formal proceedings against Key Tronic, the County of Spokane, and the Air Force. See Pet. App. A2; J.A. 15-16; Administrative Order on Consent and Interagency Agreement at 3, *In re Colbert Landfill, Spokane County, Washington* (EPA No. 1090-01-25-107) [hereinafter *Air Force Consent Order*];[3] *Wilson* v. *Key Tronic Corporation*, 701 P.2d 518, 521 (Wash. Ct. App. 1985).

The proceedings against the Air Force were resolved by an administrative consent order entered by EPA pursuant to the de minimis settlement provision of CERCLA, 42 U.S.C. 9622(g). Under that order, the Air Force agreed to pay $1.45 million to EPA to resolve whatever CERCLA liability it might have had because of its activities at the Colbert Site. As required by Section 9622(g)(1)(A), the order included findings—to which petitioner did not object—that the Air Force's activity at the site was minimal in comparison to that of other parties. In accordance with Section 9622(g)(5), the order indicated that the Air Force "shall not be liable for claims for contribution for [matters covered by the order] by any other person." *Air Force Consent Order*, *supra*, at 3-6, 12; see Pet. App. A2; J.A. 16-17.

The proceedings against petitioner were resolved by a consent decree entered in an action the regulatory agencies brought against petitioner and the County of Spokane in the United States District Court for the Eastern District of Washington. That document ex-

[3] That document appears in the record as Exhibit 1 to Clerk's Record item 23.

pressly noted the concurrent consent order agreed to with the Air Force, required petitioner to pay $4.2 million toward the cost of cleaning up the site, and required the County to implement the cleanup. Consent Decree at 4, 18-19, *State of Washington* v. *County of Spokane*, Civ. No. 89-033-RJM [hereinafter *Petitioner's EPA Consent Decree*][4]; see Pet. App. A2; J.A. 16-17.

2. Petitioner subsequently filed this suit against a variety of parties (including the United States) in the United States District Court for the Eastern District of Washington, seeking contribution under CERCLA for the costs it incurred pursuant to its settlement, as well as attorney fees and additional response costs that it claimed it had incurred independently. When the United States responded that the Air Force's consent order protected it from liability for contribution toward the costs of matters covered by the consent order, petitioner limited its claim against the United States to certain matters it viewed as being beyond the scope of the consent order. In an August 9, 1990 opinion (J.A. 14-39), the court ruled that petitioner was entitled to pursue recovery against the United States of response costs that it claimed it had incurred independently of the response of the regulatory agencies to problems at the site. J.A. 20-27.

In response to that decision, petitioner and the United States entered into a consent decree, under which the United States agreed to pay to petitioner $185,000 toward response costs petitioner had incurred before entry of the consent decree between petitioner and EPA. Consent Decree at 1, Clerk's Record item 92 [hereinafter *Response Cost Consent Decree*]. The parties were

[4] That document appears in the record as Exhibit 4 to Clerk's Record item 23.

unable to agree, however, on whether the United States was obligated to reimburse petitioner for certain specified attorney fees petitioner had incurred. Accordingly, the decree excepted the following claims from the settlement:

> A. Costs and fees incurred by attorneys and investigators for [petitioner] in the amount of $365,649 during [petitioner]'s search for additional potentially responsible parties and costs and fees incurred by attorneys related to the negotiation of [Petitioner's EPA Consent Decree];
> B. The salary of [petitioner]'s General Counsel and Secretary in the amount of $70,000, for time spent supervising the search for additional potentially responsible parties and negotiating [Petitioner's EPA Consent Decree];
> C. Attorneys' fees and costs incurred by [petitioner] in the prosecution of this action [$73,500]; and
> D. Prejudgment interest on the excepted claims [$12,000].

Id. at 2-3 (quoted at Pet. App. B3-B4). After briefing and oral argument, the district court concluded in a 1991 opinion (Pet. App. B1-B15) that the United States was liable to petitioner for the excepted claims. *Id.* at B6-B13.

3. A divided panel of the court of appeals reversed the award of attorney fees.[5] Pet. App. A1-A5. The relevant portion of the opinion relied entirely on the opinion in a related case, *Stanton Road Associates* v. *Lohrey*

[5] The government did not challenge the award of prejudgment interest.

Enterprises, id. at C1-C20. In that case, the court reviewed the applicable statutory language, which authorizes recovery of the "necessary costs of response" and defines "response" as "removal, remedy, and remedial action * * * includ[ing] enforcement activities related thereto." CERCLA Sections 107(a), 101(25), 42 U.S.C. 9607(a), 9601(25). The court noted the "American Rule" described by this Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247 (1975), under which "a prevailing party cannot recover attorneys' fees in the absence of congressional authority." Pet. App. C6. The court also considered (*id.* at C7) this Court's opinion in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), which stated that attorney fees are not recoverable "absent explicit congressional authorization," *id.* at 185. Relying on those cases, the court concluded that the reference to "enforcement activities" in Section 101(25) of CERCLA was not sufficiently explicit to justify an award of attorney fees. Pet. App. C7. Judge Canby dissented, both in the *Stanton Road* case, *id.* at C15-C20, and in this case, *id.* at A5.

SUMMARY OF ARGUMENT

The Court's decisions in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), establish that federal courts may not award attorney fees to a prevailing party absent explicit statutory authorization. Because there is no explicit authorization for an award of attorney fees in this case, petitioner is not entitled to such an award.

1. The relevant provisions of CERCLA authorize petitioner to recover "necessary costs of response" and

define "response" to include "enforcement activities." CERCLA Sections 107(a)(B), 101(25), 42 U.S.C. 9607(a)(B), 9601(25). Those provisions do not refer to attorney fees directly and, standing alone, do not constitute the explicit authorization that *Alyeska* requires for a fee award.

2. The conclusion that Congress has not authorized an award of attorney fees in this case is bolstered by the presence of several unquestionably explicit authorizations in other provisions of CERCLA, including one provision enacted in the same statute that added the reference to "enforcement activities" on which petitioner relies. Congress's ready use of precise language in other circumstances counsels against concluding that the vague language on which petitioner relies authorizes an award of attorney fees in this case.

3. In any event, petitioner is not entitled to such an award because petitioner's suit does not constitute enforcement activity. In the area of administrative law, the term "enforcement" typically refers to an action brought by an administrative agency to enforce some directive of a statute it administers. Although the term in some cases might include actions a statute authorizes private parties to bring, we believe that the term when applied to CERCLA must be limited to actions that ensure that hazardous waste sites are cleaned up or shift the costs of pollution to polluters from society as a whole. Because petitioner's suit does not further those purposes, but rather is limited to reallocating the costs of pollution among polluters, we do not view it as enforcement activity under CERCLA.

CERCLA's use of similar phrases in other provisions supports our understanding of the meaning of "enforcement." The statute uses similar phrases—references to

enforcement actions, enforcement measures, and enforcement proceedings—almost exclusively to refer to actions taken to ensure that hazardous waste sites are cleaned up or to shift the cost of pollution to polluters. None of CERCLA's uses of forms of the verb "enforce" unambiguously includes actions—such as the suit here—that seek only to reallocate the cost of pollution among polluters. That pattern of usage suggests that our understanding, not petitioner's, correctly captures the intent of the statute.

Our understanding also is supported by the circumstances that occasioned enactment of the reference to "enforcement activities." Before that reference was added, there was a controversy whether the government could recover the cost of its enforcement activities. The addition of that reference resolved that controversy by giving the government an express entitlement to recover such costs.

4. Finally, petitioner is not entitled to recover the fees it seeks under an exception to the *Alyeska* rule for nonlitigation attorney fees. Even if such an exception exists, it would be limited to the "necessary costs of response" described in CERCLA Section 107(a), which include only fees incurred in activities directly related to the containment or cleanup of hazardous releases. Because none of the fees petitioner seeks are directly related to the protection of the environment, they would not be covered by any such exception.

ARGUMENT

BECAUSE CERCLA DOES NOT EXPLICITLY AUTHORIZE A PRIVATE PARTY TO RECOVER ATTORNEY FEES IN A SUIT TO RECOVER RESPONSE COSTS UNDER SECTION 107 OF CERCLA, THE DISTRICT COURT ERRED IN AWARDING ATTORNEY FEES IN THIS CASE

Although the rule in other common-law jurisdictions has been different, the Court has recognized since the eighteenth century that federal courts generally do not award attorney fees to the prevailing party. See *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240, 247-250 (1975). As the Court explained in *Alyeska*, that rule started from the Court's early conclusion that federal courts did not have any inherent authority to impose an award of fees and was reaffirmed by a long course of congressional enactments specifying the types of costs that federal courts should award to the prevailing party. *Id.* at 250-258. Hence, by the time the Court decided *Alyeska* in 1975, Congress had enacted numerous "specific and explicit provisions for the allowance of attorneys' fees under selected statutes granting or protecting various federal rights." *Id.* at 260. Against that background, the Court held that it was inappropriate to imply "any roving authority to the Judiciary to allow counsel fees as costs or otherwise whenever the courts might deem them warranted." *Ibid.*[6] Accord-

[6] For that reason, we see little relevance in the extended policy discussion offered by petitioner. As the Court explained in *Alyeska*, the existence of important public policies is not sufficient to justify judicial implication of authorization to award attorney fees:

> If the [policy at issue in *Alyeska*] * * * is a matter of the gravest importance, it would appear that a wide range of

ingly, federal courts can award fees to the prevailing party in federal litigation only when Congress has "carve[d] out specific exceptions to [that] general rule." *Id.* at 269. As the Court further explained two years later in *Runyon* v. *McCrary*, 427 U.S. 160 (1976), federal courts should not assume that Congress "implicitly" intended to authorize fees: "absent explicit congressional authorization, attorneys' fees are not a recoverable cost of litigation." *Id.* at 184, 185. A mere "generalized command" is insufficient. *Id.* at 186. Because petitioner cannot identify any explicit congressional authorization for an award of the fees it seeks in this case, its claim should fail under the austere reasoning of *Alyeska* and *Runyon*.

I. CERCLA DOES NOT EXPLICITLY AUTHORIZE AN AWARD OF ATTORNEY FEES IN A SUIT BY A PRIVATE PARTY TO RECOVER RESPONSE COSTS UNDER CERCLA SECTION 107

Section 107(a) of CERCLA establishes a cause of action against any party who is responsible for a hazardous substance problem covered by CERCLA; its four

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statutes would arguably satisfy the criterion of public importance and justify an award of attorneys' fees to the private litigant. And, if *any* statutory policy is deemed so important that its enforcement must be encouraged by awards of attorneys' fees, how could a court deny attorneys' fees to private litigants in actions under 42 U.S.C. § 1983 seeking to vindicate *constitutional* rights?

421 U.S. at 264. It is not the role of the judiciary to balance petitioner's view (Pet. Br. 28) that the availability of attorney fee awards will encourage parties such as petitioner to engage in cleanup activity, against the contrary view that the availability of attorney fee awards will encourage litigation and resistance to enforcement activity.

numbered subparagraphs describe the types of defendants covered by the cause of action. 42 U.S.C. 9607(a)(1)-(4). Section 107(a)(A) then provides that a defendant in such an action (a responsible party) is liable for "all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan."[7] 42 U.S.C. 9607(a)(A).[8] In contrast, Section 107(a)(B)—the provision on which petitioner's action rests—authorizes the recovery of "any other necessary costs of response incurred by any other person consistent with the national contingency plan." 42 U.S.C. 9607(a)(B). Section 101(25), in turn, defines "response" to mean "remove, removal, remedy, and remedial action;, [*sic*] all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. 9601(25).

None of those provisions refers directly to attorney fees, much less explicitly authorizes an award of attorney fees in cases such as this one.[9] Contrary to the

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[7] The national contingency plan was promulgated by EPA as a regulation pursuant to CERCLA Section 105, 42 U.S.C. 9605, and is codified at 40 C.F.R. Part 300.

[8] Although the court of appeals and petitioner have referred to the lettered subparagraphs of Section 107(a) as subdivisions of subparagraph (4) of Section 107(a), it is plain that each of the lettered subparagraphs actually applies to each of the numbered subparagraphs. Hence, we follow the more accurate practice of referring to the four lettered subparagraphs of Section 107(a) as subdivisions of Section 107(a) itself. Our practice is consistent with internal citations contained in CERCLA itself. See, *e.g.*, 42 U.S.C. 9607(f)(1) (referring to "subparagraph (C) of subsection (a) of this section").

[9] Both petitioner and its amicus rely heavily on *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989). That case, of course, in-

suggestion of petitioner's amicus (ARCO Br. 10 & n.11), the term "enforcement activities" in CERCLA Section 101(25) does not refer only to attorney fees, much less imply that all attorney fees are recoverable. For example, environmental regulators engaged in enforcement activity might incur substantial fees to third-party professionals (other than attorneys) for technical services involved in ascertaining and evaluating a party's compliance with orders issued by the regulators. Moreover, as we explain in Point III.C, *infra*, the term "enforcement activities" was added to the statute in 1986 to clarify that the government can recover its enforcement costs, not to establish a general right to attorney fees for prevailing parties in all CERCLA contexts.

II. THE INCLUSION OF EXPLICIT AUTHORIZATIONS OF ATTORNEY FEE AWARDS IN OTHER PROVISIONS OF CERCLA COUNSELS AGAINST AWARDING FEES IN THIS CASE, WHERE NO SUCH PROVISION APPLIES

As the Court explained in *Alyeska*, one of the most important bases for the canon of construction under which federal courts will not award attorney fees unless a statute explicitly authorizes such an award is the prevalence of statutes that include "specific and explicit provisions for the allowance of attorneys' fees." See *Alyeska*, 421 U.S. at 260 & n.33 (listing statutes that explicitly authorize an award of attorney fees).

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volved different provisions of CERCLA than those at issue here, and involved the clear statement rule the Court has discerned in the Eleventh Amendment context, rather than the American Rule articulated in *Alyeska*. Hence, we find nothing in that case that has direct relevance to decision of this case.

Because of the long tradition in this country against an award of attorney fees to the prevailing litigant, and because Congress in numerous instances has adopted language that indubitably authorizes an award of fees, federal courts should hesitate before concluding that a "generalized command" (*Runyon*, 427 U.S. at 186) was intended to authorize an award of attorney fees.

That concern applies with especial force here, because CERCLA itself contains several provisions that undoubtedly authorize awards of attorney fees. For example, the citizens suit provision in Section 310(f) of CERCLA provides that a court "may award costs of litigation (including reasonable attorney and expert witness fees) to the prevailing or the substantially prevailing party whenever the court determines such an award is appropriate." 42 U.S.C. 9659(f). Similarly, Section 110(c) of CERCLA provides that the Secretary of Labor may award "a sum equal to the aggregate amount of all costs and expenses (including the attorney's fees)" that an applicant incurs in connection with the whistleblower protection provisions of CERCLA. 42 U.S.C. 9610(c).

Also, it is not disputed that Sections 107(a)(A), 101(23), and 104(b) combine to authorize the federal government to recover all costs of response and enforcement that it incurs, including the cost of attorney time. As we explained above, Section 107(a)(A) establishes a cause of action against responsible parties for "all costs of removal or remedial action incurred by the United States Government." 42 U.S.C. 9607(a)(A). Section 101(23), in turn, defines "removal" to include "action taken under section 9604(b) of this title." 42 U.S.C. 9601(23). Finally, Section 104(b) authorizes EPA to "un-

dertake such planning, legal, fiscal * * * and other studies or investigations as [it] may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter." 42 U.S.C. 9604(b)(1).[10] Because the provision expressly authorizes the government to undertake "legal * * * studies or investigations," the provision authorizes the recovery of legal—*i.e.*, attorney—costs incurred in the course of the described activities.[11] Because CERCLA authorizes EPA to delegate authority under Section 104(b)(1) to "[a] State or political subdivision thereof or Indian tribe," CERCLA Section 104(d)(1)(A), 42 U.S.C. 9604(d)(1)(A), those entities have a similar entitlement to recover legal costs when they take actions pursuant to such delegations of authority.

Congress's express and repeated authorizations of attorney fee awards in CERCLA provide particularized support in this context for the inference the Court drew in *Alyeska*: because Congress has shown itself quite ready to authorize an award of attorney fees explicitly, the absence of an explicit authorization strongly suggests that Congress did not form an intent to authorize a fee award in a case such as this one. The timing of the enactment of the express attorney fee provision in

[10] The text of Section 9604(b)(1) refers to "the President," but the President has delegated the authority described in the text to the Administrator of the EPA. See 42 U.S.C. 9604 note (describing delegation of functions under Section 9604).

[11] See Pet. Br. 26-27 (agreeing that CERCLA authorizes recovery of fees by the United States). Since 1986, it has been clear that the reference to "response" actions in Section 104(b)(1)'s list of covered activities includes "enforcement activities related thereto." CERCLA Section 101(25), 42 U.S.C. 9601(25).

CERCLA Section 310(f) bolsters that inference considerably. That provision was added by Section 206 of the Superfund Amendments and Reauthorization Act of 1986 (SARA), Pub. L. No. 99-499, 100 Stat. 1703, the same statute that added to CERCLA Section 101(25) the reference to "enforcement activities" on which petitioner relies. See SARA § 101(e), 100 Stat. 1615 (amending 42 U.S.C. 9601(25)). That inference supports the determination of the court of appeals that petitioner was not entitled to the fees it sought in this case.[12]

III. A SUIT TO REALLOCATE THE COSTS OF POLLUTION AMONG POLLUTERS IS NOT A SUIT TO ENFORCE CERCLA

The principal contention of petitioner and its amicus Atlantic Richfield Company is that Congress explicitly authorized an award of attorney fees in cases such as this one when it included a reference to "enforcement activities" in the definition of "response." Pet. Br. 12-

[12] Our reading of CERCLA reflects a rational design of attorney fee awards, under which attorney costs generally are available for suits that further the primary purposes of CERCLA: ensuring that hazardous waste sites are cleaned up and shifting the costs of pollution to polluters. The two main types of suits that further those purposes are suits by government entities in their regulatory capacity and citizens suits seeking to enforce compliance with CERCLA. Because of the great potential for whistleblowers to reveal wrongful activity that otherwise would not be uncovered (and thus not be remedied), whistleblower suits serve those goals as well. By contrast, the suit in this case merely reallocates costs among polluters, a goal that is not in our view central to CERCLA's enforcement objectives (as we discuss in more detail in Point III.A, *infra*).

21; ARCO Br. 9-16.[13] Even if—contrary to our submission above—the reference to "enforcement activities" were thought to be sufficiently explicit on its own to justify an award of attorney fees in cases such as this one, petitioner's claim would fail because petitioner's suit is not part of the "enforcement activities" described in Section 101(25) of CERCLA.

A. CERCLA Is Enforced By Activities That Ensure That Hazardous Waste Sites Are Cleaned Up Or That Shift Costs To Polluters From Society As A Whole, Not By Activities That Reallocate The Costs Of Pollution Among Polluters

Petitioner's argument that CERCLA's reference to "enforcement activities" includes any suit whatsoever, so long as it is described by the statute, ignores the most common usage of the word "enforcement" in statutes that delegate responsibilities to administrative agencies—to describe suits by the agency to require compliance with orders issued under the authority delegated by the statute. See, *e.g.*, *Thunder Basin Coal Co.* v. *Reich*, No. 92-896 (Jan. 19, 1994), slip op. 7 (describing "pre- and post-enforcement challenges" and "enforcement proceedings" under the Federal Mine Safety and Health Amendments Act of 1977); see also 5 U.S.C. 703 (provision of Administrative Procedure

[13] Petitioner apparently does not argue that the attorney fees associated with negotiating the consent decree (a portion of the costs described in categories A and B of the costs at issue here, see page 5, *supra*) are recoverable as part of the costs of "enforcement activities." As we understand it, the only basis argued in this Court for recovery of those costs is that they are not covered by the *Alyeska* rule because they are nonlitigation attorney fees. See Pet. Br. 30-32. We address that argument in Point IV, *infra*.

Act referring to "civil or criminal proceedings for judicial enforcement"). The most likely source of the terminology adopted in Section 101(25) is that customary usage, rather than the broader definition urged by petitioner.[14]

To be sure, a reference to "enforcement" activities might not strictly be limited to actions brought by regulatory authorities; in some cases Congress relies on private parties to compel compliance with a statute in a manner that reasonably could be characterized as "enforcement" of the statute. But whatever may be the precise boundaries of the reference to "enforcement activities," we believe that the term cannot plausibly be applied to activities that do not directly further what we understand to be the primary goals of CERCLA: ensuring that hazardous waste sites are cleaned up and that the costs of pollution are borne by polluters as a group rather than society as a whole. Cf. Pet. Br. 18 (referring to "CERCLA's policy that the costs of cleanup be borne by polluters"). Once cleanup has been achieved and the costs of pollution have been shifted to polluters, CERCLA's enforcement has been completed.

Even if it is true that some actions by private parties under CERCLA might be characterized as enforcement actions (such as citizens suits under CERCLA Section 310), actions such as petitioner's suit—which seeks to shift the burdens of CERCLA from one polluter to another—further secondary goals that should not be char-

[14] The House Report that accompanied the portion of SARA that added the "enforcement" language to CERCLA offers an explanation consistent with our understanding of the concept of "enforcement." See H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. V, at 5 (1985) ("Under existing law, the primary responsibilities for cleanup and enforcement are vested in the President.").

acterized as "enforcement activities" covered by Section 101(25). Petitioner's argument that its suit to compel contribution is a suit to "enforce" CERCLA rests on the premise that a central goal of CERCLA is to ensure that polluters share costs in accordance with their proportionate responsibility.[15] Although CERCLA includes procedures under which private parties can attempt to reallocate their financial obligation in accordance with their share of responsibility, we do not view those procedures as furthering the primary thrust of CERCLA or as part of its enforcement activities. Most obviously, CERCLA imposes liability for the entire cost of cleanup on any single responsible party, without imposing any obligation that EPA pursue other responsible parties. CERCLA Section 107(a)(A), 42 U.S.C. 9607(a)(A) (imposing liability for "all costs of removal or remedial action" on "any person" who has a sufficient connection to the pollution). That focus on ensuring payment by some polluter in the first instance suggests that litigation among polluters to reallocate liability is not "enforcement" of CERCLA.

B. CERCLA Does Not Use Forms Of The Verb "Enforce" To Refer To Suits To Reallocate The Costs of Pollution Among Polluters

CERCLA does not refer to "enforcement activities" except in Section 101(25)'s definition of "response." Its use of related terms, however, supports our understanding of the meaning of that phrase. The most similar usages are the references in several provisions to enforcement actions, enforcement measures, and enforce-

[15] See Pet. Br. 24 (referring to "scheme of requiring all polluters to pay"); see also ARCO Br. 3 (referring to a responsible party's "statutory obligation to pay its share of response costs").

ment proceedings.[16] Consistently with our understanding of the term, those references describe actions taken to ensure the cleanup of hazardous waste sites and the shifting of the costs of pollution to polluters. None of those references describes actions to reallocate the costs of pollution among polluters.[17]

CERCLA also frequently uses various forms of the verb "enforce." The pattern of those usages supports our view that the term "enforcement activities" does not include actions brought by one polluter to shift to other polluters the costs of responding to contamination to which the plaintiff contributed.[18] A heavy pre-

[16] See, *e.g.*, 42 U.S.C. 9604(d)(1)(A) (authorizing EPA to authorize local governmental entities to "carry out * * * enforcement actions [related to actions taken by the entity under 42 U.S.C. 9605(a)(8)]"), 9606(b) ("action" by EPA "to enforce" an order issued by EPA), 9611(c)(3) (authorizing use of Superfund to "take enforcement * * * action against releases of hazardous substances"), 9611(c)(6) (authorizing use of Superfund for "enforcement measures"), 9613(a) (referring to "civil or criminal proceeding for enforcement"), 9613(h)(2) (referring to "action to enforce an order issued [by regulatory authorities]"), 9617(c)(2) (referring to "enforcement action" under 42 U.S.C. 9606), 9622(b)(4) (referring to "enforcement action" on behalf of the Superfund), 9622(e)(5) (describing EPA's authority "to undertake response or enforcement action"), 9651(h)(1)(F) (requiring EPA to report on "enforcement actions" it has undertaken), 9659(c) (granting jurisdiction over "actions * * * to enforce" rules issued under CERCLA).

[17] Although the provision in 42 U.S.C. 9622(f)(6)(C) allowing EPA to include in settlement agreements provisions for "future enforcement action under [42 U.S.C. 9606 or 9607]" could be construed to contemplate private party actions under Section 9607(a)(B), the context suggests that the reference is limited to government enforcement.

[18] As the text should make clear, our reading of the statute does not give the United States any particular entitlement to

ponderance of the references plainly refer only to the activities of government environmental regulators.[19] Although a few of the references—such as the reference in Section 101(25)—could be construed to include activities by other parties,[20] none of them expressly in-

fees not given to other similarly situated parties. In cases where an agency of the United States incurred costs in response to pollution to which that agency contributed, any attempt by the agency to recover attorney fees in a contribution action would be barred for the same reason petitioner's attempt should be barred in this case.

[19] See, *e.g.*, 42 U.S.C. 9604(b)(1) (referring to acts of the EPA "to enforce the provisions of this chapter"), 9604(e)(1) (authorization of officials designated by the President to take actions for "enforcing" CERCLA), 9606(c) (references to "enforcement * * * authorit[y]" established by Section 9606 and to "assignment of responsibility for * * * enforcement of standards and permits"), 9609(f) (referring to "President's authority to enforce any provisions of this chapter"), 9610(a) (referring to "enforcement" of whistleblower provisions of CERCLA), 9610(e) (same), 9620(e)(5) (referring to "enforcement status" of sites), 9621(e) (referring to enforcement of permits by appropriate State and Federal agencies), 9622(d) (section governing "enforce[ment]" of settlements entered into with EPA).

Several of the references that seem to contemplate only activities by environmental regulatory authorities seem less relevant because they use the term in different contexts. See 42 U.S.C. 9601(10)(J) (referring to "enforceable" requirements in a pretreatment program submitted by a local government for federal approval), 9604(d)(2) (authority of EPA to "enforce" a contract), 9604(d)(3) (authority of EPA to assist local government entity in "enforcement" of a contract).

[20] See, *e.g.*, 42 U.S.C. 9607(k)(4)(a) (obligating Secretary of the Treasury to specify standards to assure that private insurance will "carry out the purposes of this subsection in a reliable, enforceable, and practical manner"), 9620(a)(4) (referring to "State laws regarding enforcement"), 9621(d)(2)(B)(ii)(III) (requiring that proposed remedial action include "enforceable measures that will preclude human exposure to * * * contaminated groundwater").

cludes activities—like those at issue here— that seek only to reallocate costs among polluters rather than to shift them to polluters in the first instance.[21]

The absence from CERCLA's frequent references to "enforcement" of any reference that necessarily includes actions such as the one at issue here, coupled with the preponderance of references that could not plausibly include such an action, suggests that the term does not include actions to reallocate the costs of pollution among polluters.

C. The Circumstances Surrounding The 1986 Enactment Of The Reference To "Enforcement Activities" Do Not Indicate That Congress Intended That Provision To Cover Suits To Reallocate The Costs of Pollution Among Polluters

The provision on which petitioner relies was added to CERCLA by Section 101(e) of SARA, 100 Stat. 1615. That provision inserted a new clause into the definition of "respond" or "response," highlighted in the following quotation of the current provision:

> The terms "respond" or "response" means remove, removal, remedy, and remedial action;, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. 9601(25) (emphasis added).[22]

[21] One provision authorizes federal district courts to "enforce" settlement decrees entered into by EPA. 42 U.S.C. 9622(d)(3). In our view, that provision sheds little light on the question before the Court.

[22] Both the superfluous semicolon before the beginning of the new phrase and the lack of agreement between the subject and the verb of the main clause appear in the statute as currently

At the time that amendment was made, there was contemporaneous litigation regarding the government's ability to recover the costs of attorney time expended in enforcement activity.[23] Section 107(a)(A) of CERCLA covered only the "costs of removal or remedial action." 42 U.S.C. 9607(a)(A) (1982). The definitions of those terms (in CERCLA Sections 101(23) through (25), 42 U.S.C. 9601(23)-(25) (1982)) did not directly refer to enforcement, although the definition of "remove" included "the taking of such other actions as may be necessary to prevent, minimize or mitigate damage to the public health or welfare or to the environment, which may otherwise result from a release or threat of release." CERCLA Section 101(23), 42 U.S.C. 9601(23) (1982).[24]

As a result, although the government believed—and continues to believe—that Section 104(b)(1) and the

codified. See also 42 U.S.C. 9601 note regarding amendments to Paragraph (25) (describing errors in Section 101(f) of SARA, 100 Stat. 1616).

[23] See, *e.g.*, *United States* v. *South Carolina Recycling and Disposal, Inc.*, 635 F. Supp. 984, 1009 (D.S.C. 1984), aff'd in part and vacated in part, 858 F.2d 160 (4th Cir. 1988), cert. denied, 490 U.S. 1106 (1989); *United States* v. *Conservation Chemical Company*, 619 F. Supp. 162, 186 (W.D. Mo. 1985); *United States* v. *Northeastern Pharmaceutical and Chemical Company*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), aff'd, 810 F.2d 726 (8th Cir. 1986), cert. denied, 484 U.S. 848 (1987). Those courts concluded that CERCLA adequately demonstrated that Congress had intended for the United States to recover enforcement costs, including the costs of attorney time.

[24] The most obvious activity that would constitute enforcement activity, but not indubitably a response action under CERCLA's pre-SARA language, in that category would be an action under CERCLA Section 106(b)(1), 42 U.S.C. 9606(b)(1), to enforce orders entered under CERCLA Section 106(a), 42 U.S.C. 9606(a), to protect public health and welfare.

related provisions of CERCLA authorized recovery of the costs of enforcement activity, the litigation raised an issue whether the language of CERCLA adequately covered those costs. Given the wide variety of enforcement proceedings authorized under CERCLA (see note 16, *supra*), that lack of clarity had the potential to be quite detrimental to the funding of EPA's costly mission under CERCLA. The amendment neatly resolved that issue by expressly including "enforcement activities" within the definition of "response."

The House Report on the amendment supports that understanding. The Committee explained:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. I, at 66-67 (1985).[25] Nothing in that explanation supports petitioner's view (Pet. Br. 16-18; see ARCO Br. 12-13) that the amendment was intended to wreak a broad alteration in the framework for attorney fee awards under CERCLA. The difference between the House Report statement that the amendment was intended to "confirm" Congress' intent that the Government should recover its enforcement costs, and petitioner's contention that Congress intended to create a new right for private parties to recover attorney fees is readily apparent. Hence, although the discussion in the House Report is not dispositive, it does provide considerable sup-

[25] The House Report describes the amendment as directed at the definition of "response action," a term found in CERCLA Section 104(b)(1), 42 U.S.C. 9604(b)(1), but not found in the provision on which petitioner relies, CERCLA Section 107(a)(B), 42 U.S.C. 9607(a)(B).

port for the understanding of the provision we have offered, and strongly counsels against interpreting the language of the amendment as explicit authorization for attorney fee awards in cases such as this one.[26]

Contrary to petitioner's submission (Pet. Br. 16; see ARCO Br. 12-13), we see little significance in Congress's choice to include the reference to enforcement activities in a definition of the costs of "response," which are covered by the cause of action for private parties in Section 107(a)(B), rather than in the definition of the costs of "removal" or "remedial action," which are covered by the cause of action for government entities under Section 107(a)(A). First, as even petitioner admits (Pet. Br. 16), the somewhat odd phrasing of the amendment makes it clear that the reference to "enforcement activities" is included not only in the definition of the costs of "response," but also in the definition of the costs of "removal" and "remedial action." See CERCLA Section 101(25), 42 U.S.C. 9601(25) ("[A]ll such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto.").[27] Second, because the term "response" is de-

[26] The other two references to the amendments in the committee reports do little more than paraphrase the language of the statute, and thus shed little light on the question at hand; their ambiguity is no more instructive than the ambiguity of the statute Congress enacted. See H.R. Rep. No. 253, 99th Cong., 1st Sess., Pt. V, at 6 (1985) (describing subsection 101(d), the predecessor to SARA § 101(e)); H.R. Conf. Rep. No. 962, 99th Cong., 2d Sess. 184 (1986). As the Conference Report explains, the Senate version of the bill did not contain a similar provision, and thus the Senate Report does not discuss the point. *Id.* at 185.

[27] The reference to "enforcement activities" in Section 101(25) plainly applies to government "response actions" authorized by Section 104, and to actions to recover such costs brought by the United States under Section 107(a)(A). Hence, there is nothing odd about the United States' reliance in the court of appeals on Section 101(25) as part of the basis for recovery by the United States of the costs of attorney time in enforcement actions. See Pet. Br. 13 (noting that reliance). As explained in the text, Section 104(b) establishes that the government may recover legal costs; the reference to Section 101(25) is necessary to make it clear that enforcement activities are among the types of response actions for which the costs described in Section 104(b) may be recovered. Conversely, because CERCLA Section 104(b) plainly does not apply here, petitioner can draw no substantial support for a fee award from the amendment to CERCLA Section 101(25).

fined to include "remove," "removal," and "remedial action," Congress could add the concept of enforcement activities to all of those defined terms most efficiently by making a single amendment to the definition of "response" in CERCLA Section 101(25).[28] The logistical benefits of making the change in a single amendment are a more plausible explanation for the placement of the change in Section 101(25) than petitioner's suggestion.

IV. THE ATTORNEY FEES SOUGHT BY PETITIONER ARE NOT OTHERWISE NECESSARY COSTS OF RESPONSE

Petitioner also argues (Pet. Br. 30-32)[29] that the at-

[28] Indeed, to the extent that Congress's precise purpose in expanding the definition of "response" was to clarify the breadth of the concept of the government's "response action" covered by CERCLA Section 9604(b)(1)—as the House Report suggests, see page 23 & n.25, *supra*—an amendment to the definitions of "removal" and "remedial actions" would not have been adequate.

[29] Petitioner further argues (Pet. Br. 29) that it is entitled to recover the fees it seeks under the common benefit exception to the American Rule. That argument was not presented to the court of appeals or in the petition and thus is not properly before the Court. See, *e.g.*, *Zobrest* v. *Catalina Foothills School District*, 113 S. Ct. 2462, 2466 (1993).

torney fees it seeks are recoverable because they are nonlitigation attorney fees, based on its view that the American Rule articulated in *Alyeska* covers only litigation-related attorney fees.[30] Whatever merit there may be to the view that the American Rule does not cover some category of "nonlitigation" attorney fees, this is not a suitable case in which to address that question because the fees sought by petitioner would not be recoverable under that exception.

Petitioner relies on the decision of the Tenth Circuit in *FMC Corporation* v. *AERO Industries, Inc.*, 998 F.2d 842 (1993). The panel in *FMC* reasoned that attorney fees that are not incurred in pursuing litigation are not covered by the *Alyeska* rule, and then determined that such fees would be "necessary costs of response" recoverable under CERCLA Section 107(a)(B) if they were "necessary to the containment and cleanup of hazardous releases." 998 F.2d at 848; see also *United States* v. *Hardage*, 982 F.2d 1436, 1447-1448 (10th Cir. 1992) (stating same rule in dictum). The *FMC* court explained that the claimant in that case sought recovery for "attorneys fees generated in designing and negotiating the removal action and in preparing and carrying out the work plan approved by the EPA," including "fees paid for negotiating and drafting contracts with environmental professionals who performed the removal work, negotiating changes to the work plan, and monitoring work progress." 998 F.2d at 848. Because some of those costs might have been "necessary response costs," the court remanded the matter to the district court to determine whether any of the claimed costs could be recovered under Section 107(a)(B). *Ibid.*

[30] That argument apparently was not presented to the court of appeals, and thus is not squarely before the Court. We nevertheless address it here because it arguably was raised in the petition, Pet. 11-12.

None of the fees at issue in this case are covered by the rule articulated in *FMC*, which must in our view be limited to costs directly related to remedying pollution, as opposed to costs incurred in resisting responsibility or attempting to shift liability to third parties. First, and most obviously, category C of the claims[31] would not be covered, because that category covers fees "incurred * * * in the prosecution of this action." *Response Cost Consent Decree, supra*, at 3.[32]

Petitioner also seeks recovery for costs incurred in searching for potentially responsible parties, whether incurred by outside attorneys or by its general counsel (included in categories A and B of the claims, respectively). Those activities contributed nothing to the containment and cleanup of hazardous releases at the site; petitioner's status as a responsible party under Section 107(a) makes petitioner liable for the entire cost of the cleanup without regard to the existence, location, or solvency of other potentially responsible parties. Nothing in the definitions of "removal," "remedial action," and "respond" in CERCLA Sections 101(23), (24), and (25) suggests that those costs should be covered when incurred solely for the purpose of reallocating costs among polluters. Accordingly, those costs are not recoverable under the *FMC* rationale.

Finally, petitioner seeks to recover costs incurred in negotiating the consent decree, whether incurred by outside counsel or by its general counsel (included in categories A and B of the claims, respectively). Although

[31] The covered claims are set out in full at page 5 of this brief and at Pet. App. B3-B4.

[32] The petition comes close to conceding the point, by arguing at Pet. 12 n.14 that the other two types of costs were recoverable without referring to the category C costs.

that poses a closer question, we believe that the district court plainly erred in granting summary judgment for petitioner with respect to those costs. To the extent those costs were incurred in resisting EPA's attempt to enforce the statute, as appears to be the case, the costs did not contribute to the cleanup or containment of hazardous substances. See *Hardage*, 982 F.2d at 1448 (costs incurred in "investigating remedial alternatives" not recoverable because "costs [a private party incurs] in developing its own remedy, solely to defend against the government's *** action" are not "necessary" within the meaning of CERCLA). If the costs had been incurred in the voluntary design of a remedy, as opposed to criticizing and opposing a remedy proposed by the applicable government agency, recovery might be available under the *FMC* rule. See *FMC*, 998 F.2d at 848 (remanding for consideration by district court of costs that included "attorney fees generated in designing *** the removal action").[33] Because the fees were incurred in resisting the enforcement of CERCLA by EPA, however, they did not contribute to remedying pollution at the site and thus are not necessary costs of response.[34]

[33] We understand the references in *FMC* to "negotiating" the removal action to refer to negotiations with contractors who conducted the removal action, not to negotiation with EPA over the requirements of the removal action. See 998 F.2d at 848 (describing costs of "negotiating and drafting contracts with environmental professionals who performed the removal work").

[34] On that point, it is our understanding that the settlement compensates petitioner for the fees it incurred to professionals other than attorneys in the course of evaluating the remedy proposed in the consent decree. See Affidavit of David L. Powers, J.A. 11 (describing fees paid to Dames and Moore and Landau Associates, Inc.). We understand the dispute to cover only the fees payable for the time of its general counsel and to Perkins Coie for its work on that issue. See *ibid.* (describing fees paid to Perkins Coie).

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

LOIS J. SCHIFFER
Acting Assistant Attorney General

LAWRENCE G. WALLACE
Deputy Solicitor General

RONALD J. MANN
Assistant to the Solicitor General

ANNE S. ALMY
DAVID C. SHILTON
M. ALICE THURSTON
EILEEN T. MCDONOUGH
Attorneys

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APPENDIX A

§ 9601. Definitions

For purpose of this subchapter—

* * * * *

(25) The terms "respond" or "response" means[2] remove, removal, remedy, and remedial action;,[3] all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.

* * * * *

§ 9607. Liability

(a) Covered persons; scope; recoverable costs and damages; interest rate; "comparable maturity" date

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section—

(1) the owner and operator of a vessel or a facility,

(2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

(3) any person who by contract, agreement, or otherwise arranged for disposal or treatment, or arranged with a transporter for transport for disposal or treatment, of hazardous substances owned or possessed by such person, by any other party or entity, at any facility or incinceration vessel owned or operated by another party or entity and containing such hazardous substances, and

---

[2] So in original. Probably should be "mean".

[3] So in original.

(4) any person who accepts or accepted any hazardous substances for transport to disposal or treatment facilities, incinceration vessels or sites selected by such person, from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for—

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan;

(B) any other necessary costs of response incurred by any other person consistent with the national contingency plan;

(C) damages for injury to, destruction of, or loss of natural resources, including the reasonable costs of assessing such injury, destruction, or loss resulting from such a release; and

(D) the costs of any health assessment or health effects study carried out under section 9604(i) of this title.

The amounts recoverable in an action under this section shall include interest on the amounts recoverable under subparagraphs (A) through (D). Such interest shall accrue from the later of (i) the date payment of a specified amount is demanded in writing, or (ii) the date of the expenditure concerned. The rate of interest on the outstanding unpaid balance of the amounts recoverable under this section shall be the same rate as is specified for interest on investments of the Hazardous Substance Superfund established under subchapter A of chapter 98 of title 26. For purposes of applying such amendments to interest under this subsection, the term "comparable maturity" shall be determined

with reference to the date on which interest accruing under this subsection commences.

* * * * *

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93-376

In the

Supreme Court of the United States

October Term, 1993

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, ET AL.,
Respondent.

ON A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF OF PETITIONER

James R. Moore
Counsel of Record
Mark W. Schneider
Michael Himes
PERKINS COIE
1201 Third Avenue
Seattle, WA 98101-3099
(206) 583-8888

Attorneys for Petitioner

26 pp

QUESTIONS PRESENTED

Whether under the federal Superfund statute, a private party may recover attorneys' fees as response costs when fees are incurred to (a) prepare and negotiate a reasonable scope of work and consent decree related to cleanup of contaminated property; (b) search for and identify other parties responsible for the contamination; and (c) litigate cost-recovery actions against other responsible parties to compel their participation in the remediation.

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I. SUMMARY OF ARGUMENT

Key Tronic Corporation's ("Key Tronic") argument is straightforward. In 1986, Congress enacted the Superfund Amendments and Reauthorization Act ("SARA") to amend the 1980 Comprehensive Environmental Response, Compensation, and Liability Act ("CERCLA"), 42 U.S.C. § 9601 *et seq.* Through the SARA amendment to 42 U.S.C. § 9601(25) ("Section 101(25)"), a definitional section of general application, Congress explicitly authorized all persons entitled to recover costs of "response" under 42 U.S.C. § 9607(a) ("Section 107(a)") to recover costs of their "enforcement activities." That definitional section plainly applies to Key Tronic's action to recover its "response" costs from the Air Force under Section 107(a). The amended language of Section 101(25) manifests Congress' intent that attorneys' fees be awarded as costs of "response." That intent must control. Because the United States fails to show that application of the plain meaning of the statute produces a result demonstrably at odds with Congress' intent, the Court should apply the statute's plain meaning and reverse the judgment of the Ninth Circuit.

II. ARGUMENT

A. THE CERCLA STATUTE

CERCLA provides an express right of action to any person who has incurred costs to clean up a hazardous waste site to recover those costs from any other person liable under CERCLA. Section 107(a)(4)(A) and (B) provide:

> Covered persons . . . shall be liable for—
>
> (A) all costs of removal or remedial action incurred by the United States Government or a

> State or an Indian tribe not inconsistent with the national contingency plan;
>
> (B) any other necessary costs of response incurred by any other person consistent with the national contingency plan.

42 U.S.C. § 9607(a)(4)(A), (B).

CERCLA defines "response" as follows:

> The terms "respond" or "response" means [sic] remove, removal, remedy, and remedial action, *all such terms (including the terms "removal" and "remedial action") include enforcement activities related thereto.*

42 U.S.C. § 9601(25) (emphasis added). The emphasized language was added by the 1986 SARA amendments. Thus, the definition of "response" in Section 101(25), as amended by SARA, plainly applies to actions brought to recover "necessary costs of *response*" under Section 107(a)(4)(B) (emphasis added).

B. "ENFORCEMENT ACTIVITIES" MEANS ATTORNEYS' FEES.

The United States offers no meaning of "enforcement activities" that does not encompass attorneys' fees. Respondent's Brief at 12 (emphasis added) states:

> Contrary to the suggestion of petitioner's amicus, the term "enforcement activities" in CERCLA Section 101(25) does not refer *only* to attorney fees, much less imply that *all* attorney fees are recoverable. For example, environmental regulators engaged in

> enforcement activity might incur substantial fees to third-party professionals (other than attorneys) for technical services . . . The term "enforcement activities" was added to the statute in 1986 to clarify that the government can recover its enforcement costs, not to establish a *general* right for prevailing parties in all CERCLA contexts.

The United States here reveals what it is unwilling to state plainly: Congress intended "enforcement activities" to encompass attorneys' fees.[1]

The only meaning, in *addition* to attorneys' fees, offered by the United States is that Congress intended to provide for recovery of costs of "technical services" under Section 101(25)'s provision for "enforcement activities." *Id.* In making this argument the United States implicitly concedes that Congress meant "enforcement activities" to *include* attorneys' fees. Further, the United States' proffered *additional* meaning for "enforcement activities"—"technical

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[1]Similarly, the United States implicitly agrees that "enforcement activities" encompasses attorneys' fees within its meaning when it states:

> At the time that amendment [Section 101(25)] was made, there was contemporaneous litigation regarding the government's ability to *recover the costs of attorney time* expended in enforcement activity. . . . [T]hat lack of clarity had the potential to be quite detrimental to the funding of EPA's costly mission under CERCLA. *The amendment neatly resolved that issue* by expressly including 'enforcement activities' within the definition of 'response.'

Respondent's Brief at 22-23 (emphasis added).

services"—is superfluous; CERCLA already provided for recovery of costs of "technical services" *prior* to the amendment of Section 101(25). For example, 42 U.S.C. § 9601(23) provided, and still provides, for recovery of the cost of taking "such actions as may be necessary to monitor, assess, and *evaluate* the release or threat of release of hazardous substances, the disposal of removed material, or the taking of such *other* actions as may be necessary to prevent, minimize, or mitigate damage to the public health or welfare or to the environment."[2] Even more clearly, 42 U.S.C. § 9604(b) (emphasis added) ("Section 104(b)"), heavily relied upon by the United States, provides:

> the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and *other* studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

The phrase "enforcement activities" was not added to CERCLA to assure recovery of "technical services" costs.[3]

---

[2]Since CERCLA was enacted in 1980, the term "response" has been defined to mean "remove, removal, remedy, *and* remedial action." Section 101(25) (emphasis added). The 1986 SARA amendment to Section 101(25) did not limit this definition; it expanded it to include "enforcement activities related thereto."

[3]Since CERCLA was enacted in 1980, there has been no challenge to the proposition that "technical services" are recoverable as "response" costs. It is virtually unimaginable that any cleanup could be done without such costs being incurred.

Despite the United States' implicit agreement that attorneys' fees are encompassed by Congress' express provision for recovery of costs of "enforcement activities," the United States argues that this language should not be given effect under *Runyon v. McCrary*, 427 U.S. 160 (1976), and *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240 (1975). Neither *Runyon* nor *Alyeska* countenance a result that defeats Congress' intent. CERCLA's language may be "inartful," *Exxon Corp. v. Hunt*, 475 U.S. 355, 363 (1986), and may fail to use "magic words," *Pennsylvania v. Union Gas Co.*, 491 U.S. 1, 13 n.4 (1989), but the Court has previously given effect to Congress' intent, as manifested by CERCLA's language. Neither *Alyeska* nor *Runyon* compel a different result in this case.[4]

In *Alyeska* and *Runyon*, there was no statutory language even remotely suggesting that Congress intended attorneys' fees to be awarded. The United States, without discussion or analysis, simply ignores the differences between the statutory

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[4]The United States continues to argue that the United States is provided, pursuant to Section 104(b)(1)'s provision for the United States to recover its costs of "legal . . . studies," the right to recover its attorneys' fees for bringing a cost-recovery action under Section 107(a). The United States suggests that this language is "adequate" to explicitly provide for its attorneys' fees under *Alyeska* and *Runyon*. Respondent's Brief at 22 n.23. In making this argument, the United States implicitly agrees with Key Tronic's position that "magic words," *Union Gas*, 491 U.S. at 13 n.4, are *not* necessary to conclude under *Alyeska* and *Runyon* that Congress intended attorneys' fees to be awarded.

Key Tronic submits that the United States cannot plausibly contend that recovery of attorneys' fees incurred in litigation under the rubric "legal . . . studies" meets *Runyon* and *Alyeska* but "enforcement activities" does not. If "enforcement activities" encompasses attorneys' fees, as Key Tronic submits, and as the United States implicitly agrees, there is no basis to find it has that meaning for the United States alone.

language at issue in this case and the statutory language construed in *Runyon* and *Alyeska*. In this case, Congress' language providing for the recovery of attorneys' fees, as costs of "enforcement activities," may be inartful, yet even the United States implicitly agrees that Congress intended to include attorneys' fees within the scope of that language. Thus, unlike the statutes at issue in *Runyon* and *Alyeska*, Congress' intent that attorneys' fees be awarded is manifested in Section 101(25)'s express language and that intent must be given effect.[5]

C. ATTORNEYS' FEES ARE NOT LIMITED TO THE UNITED STATES.

At bottom, the United States implicitly argues that Section 101(25) includes attorneys' fees, but that it has that meaning only for the United States. The definition of "response," which provides for attorneys' fees as costs of "enforcement activities," plainly and unambiguously applies

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[5]The United States also argues that "enforcement activities" does not encompass fees in light of CERCLA's citizens suit and "whistleblower" provisions, which provide for an award of "attorney's fees" or "attorney . . . fees." 42 U.S.C. § 9610(c) (whistleblowers); 42 U.S.C. § 9659(f) (citizens suits). These provisions shed no light on the issue before the Court. As discussed in Petitioner's Brief at 26, citizens suit plaintiffs do not incur "response" costs and therefore are ineligible for attorneys' fees as costs of "response." In this light, Congress was required to provide for recovery of "attorney fees" to citizens suit plaintiffs to meet the tests set forth in *Runyon* and *Alyeska*. The United States ignores this distinction between citizens suit plaintiffs and persons such as Key Tronic who are entitled to fees as "response" costs. Likewise, because "whistleblowers" do not incur "response" costs and because the "whistleblower" attorneys' fee provision was contained in CERCLA as originally enacted, the "whistleblower" fee provision sheds no light on whether attorneys' fees are encompassed by the "enforcement activities" language added by SARA in 1986.

to Key Tronic, which sought recovery under Section 107(a)(4)(B) for its costs of "response." Key Tronic submits that this plain meaning controls. The Court should reject the United States' argument that a single term, "enforcement activities," has different meanings in the same statute. *Ratzlaf v. United States*, 114 S. Ct. 655, 660 (1994) (a statutory term, especially a term appearing only once, must be applied "the same way each time it is called into play").

In an attempt to avoid that rule of statutory construction, the United States argues that Congress *did* intend "enforcement activities" to encompass attorneys' fees, but that it intended merely to confirm the United States' preexisting statutory authority to recover fees under Section 104(b)(1). Respondent's Brief at 22-23. This argument is unpersuasive. The courts had already uniformly concluded before the 1986 SARA amendments that the United States had the statutory authority, under Section 104(b)(1), to recover its fees for bringing a Section 107(a) cost-recovery action.[6] The United States thus seems to argue that Congress took the trouble to amend CERCLA in a superfluous manner. *Cf. Kungys v. United States*, 485 U.S. 759, 778 (1988) (statutes should not be construed to render any part superfluous).

To avoid a construction of Section 101(25) that renders it superfluous, the United States contends that Congress acted

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[6]*United States v. Northeastern Pharmaceutical & Chemical Co.*, 579 F. Supp. 823, 851 (W.D. Mo. 1984), *aff'd in part and rev'd in part*, 810 F.2d 726 (8th Cir. 1986), *cert. denied*, 484 U.S. 848 (1987); *United States v. Conservation Chemical Co.*, 619 F. Supp. 162, 186 (W.D. Mo. 1985); *United States v. South Carolina Recycling & Disposal, Inc.*, 653 F. Supp. 984, 1009 (D.S.C. 1984), *aff'd in part and vacated in part*, 858 F.2d 160 (4th Cir. 1988), *cert. denied*, 490 U.S. 1106 (1989).

to amend Section 101(25) in order to resolve "controversy," Respondent's Brief at 8, regarding whether the United States was entitled, pursuant to Section 104(b), to attorneys' fees for bringing a Section 107(a) cost-recovery action.[7] The United States cites three cases to suggest a "controversy" that it claims necessitated congressional action.[8] *Each* of those cases held that Section 104(b) provided authority to award fees to the United States when it brought a Section 107(a) cost-recovery action. *Each* of those cases was decided in 1984 or 1985, well before the 1986 SARA amendments to CERCLA. In the two cases appealed, the opinions are silent on the issue of fees and that issue does not appear to have been raised on appeal. The other case was never appealed. Key Tronic submits that unanimous and unappealed rulings construing Section 104(b)(1) in favor of the United States are hardly evidence of controversy necessitating congressional action.

Even assuming, *arguendo*, that Congress amended Section 101(25) in response to such controversy, Congress responded by amending a definitional section that plainly and unambiguously applies to *all* cost-recovery actions in which a party seeks recovery of "response" costs, including actions brought under Section 107(a)(4)(B). The United States unpersuasively argues that Congress amended a definitional section plainly applying to all persons but that Congress intended to provide attorneys' fees only to the United States. If Congress had so intended, it would have manifested that intent by limiting recoverability of attorneys' fees to the

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[7]As discussed above, the United States implicitly concedes that Congress intended that attorneys' fees be awarded as a cost of "enforcement activities" when making this argument.

[8]The three cases are the same three cited in footnote 6, above.

United States, either by expressly so stating in Section 101(25) or adding the "enforcement activities" language that provides for fees to Section 107(a)(4)(A), which is not a definitional section of general application. Congress did not do so. The plain meaning of the statute controls. *United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989).

D. PRIVATE PARTIES ENFORCE CERCLA.

Common usage would suggest that when a person brings a cost-recovery action to establish that someone else is liable for cleanup costs under CERCLA, the person is "enforcing" the statute. To avoid the statute's plain meaning, the United States argues that even though the definition of "response" plainly applies to Key Tronic, and even though it implicitly concedes that the "enforcement activities" language of that definition evinces Congress' intent that fees be recovered, that definition does not apply to Key Tronic because it did not "enforce" CERCLA.[9] The United States constructs this

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[9]The United States does not contest that it paid $1.45 million to the EPA as a result of Key Tronic's efforts to enforce CERCLA, including its efforts to enforce CERCLA's liability scheme. Pet. Cert. Appendix B-14 n.4, *Key Tronic Corp. v. United States*, 766 F. Supp. 865, 872 n.4 (E.D. Wash. 1991), *rev'd*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 126 L. Ed. 2d 592 (1993). The United States asserts, however, that Key Tronic began to take steps to enforce CERCLA only "after various neighbors of the site sued petitioner." Respondent's Brief at 2. The United States cites *nothing* in the record for that proposition. There is nothing. To the contrary, the record demonstrates that Key Tronic took steps to clean up the environment and to protect the health of people near the Colbert Landfill immediately after pollution was discovered in 1980, before suit was filed in *Wilson v. Key Tronic Corp.*, 701 P.2d 518 (Wash. Ct. App. 1985). *See, e.g.*, CR 40, Ex. 11, Request for Admission No. 10 (Operator of Landfill, William Schmidt, admits that "Plaintiff Key Tronic has spent money since 1980 to fund a cleanup of the groundwater

argument from its "reading," Respondent's Brief at 15 n.12, that Key Tronic's Section 107(a) cost-recovery action does not further CERCLA's "primary goals." *Id.* at 17. This argument should be rejected.

CERCLA's legislative history is clear:

> CERCLA has two goals: (1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups.

H.R. Rep. No. 99-253 (III), 99th Cong., 2d Sess. 15 (1985), *reprinted in* 1986 U.S. Code Congressional and Administrative News (U.S.C.C.A.N.) 3038. In accord with this legislative history, the Court has recognized *both* of CERCLA's goals:

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contamination emanating from Colbert Landfill."); CR 40, Ex. 12 (Alumax defendants admit that "Plaintiff Key Tronic has spent money since 1980 investigating whether, and to what extent, hazardous substances have been released into and from the Colbert Landfill."). *Accord* CR 40, Ex. 14, at 94, 97 (trial testimony of Spokane County employee, Mr. Taam, regarding Key Tronic's early cleanup efforts); CR 40, Ex. 17, at 8, *State of Washington v. County of Spokane*, C-89-033-RJM (Consent Decree indicating same).

Key Tronic notes that even had the *Wilson* suit been filed before Key Tronic began to enforce CERCLA, which it was not, it is of no significance because a party's motives in enforcing CERCLA are irrelevant. *General Electric Co. v. Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415, 1418 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991). What matters is what a party actually does, i.e., enforce CERCLA by cleaning up the environment and enforcing CERCLA's liability scheme requiring all polluters to pay.

> Congress did not think it enough, moreover, to permit only the Federal Government to recoup the costs of its own cleanups of hazardous-waste sites; the Government's resources being finite, it could neither pay up front for all necessary cleanups nor undertake many different projects at the same time. Some help was needed, and Congress sought to encourage that help by allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties.

Union Gas, 491 U.S. at 21-22 (plurality opinion).

The United States ignores CERCLA's *twin* goals and simply chooses to designate *one* of those goals as "primary" to suit its argument. Key Tronic submits that there is no basis for claiming that one of CERCLA's goals is "primary" and, presumably, the other "secondary." Even were there a basis to distinguish "primary" and "secondary" goals, which there is not, the United States offers no reason why enforcing a secondary goal is any less of an "enforcement activity" than the enforcement of a "primary" goal.[10]

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[10]Indeed, the United States' argument is undercut by the legislative history it quotes, which states that prior to SARA the "primary responsibilities for cleanup and enforcement are vested in the President." Respondent's Brief at 17 n.14 (quoting H.R. Rep. No. 253, 99th Cong., 2nd Sess., Pt. V, at 5 (1985)). This history implies that *all* persons have a role in "cleanup and enforcement," while the President has a "primary" role. Moreover, it summarizes then-existing law, i.e., the CERCLA law *before* SARA. The Court acknowledged in *Union Gas* that SARA increased the government's reliance on private persons to carry out CERCLA's goals. *Union Gas*, 491 U.S. at 21-22. Thus, far from

The United States, citing *Thunder Basin Coal Co. v. Reich*, 114 S. Ct. 771 (1994), argues that "enforcement" of statutes that provide for regulatory enforcement should be understood to mean enforcement by governmental regulators. Nothing in that case even remotely suggests that private parties who bring suit under an express private right of action do anything other than enforce such a statute. In advancing this argument, unsupported by *Thunder Basin Coal*, the United States ignores the Court's prior decision in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 109 (1986). In *Cargill*, the Court stated that an express statutory right of action provides the "vehicle for private enforcement" of the laws. *Id.* (discussing private right of action in context of antitrust laws). *See also Alyeska*, 421 U.S. at 263 (noting that statutes providing for award of fees generally suggest that Congress has "opted to rely heavily on private *enforcement* to implement public policy"). (Emphasis added) The United States has no response to and does not address these authorities.[11]

The United States next cites "numerous" references in CERCLA to forms of the word "enforce" that refer to governmental enforcement. Respondent's Brief at 18-21. In this regard, Key Tronic does not deny, and has never denied, that the United States *also* enforces CERCLA. In any event, the United States' argument that the definitional term

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supporting the United States' argument, this history supports Key Tronic's arguments that it *enforced* CERCLA.

[11]Interestingly, governmental regulators in the Federal Trade Commission also enforce the Sherman Act, 15 U.S.C. § 1 *et seq.*, *see, e.g.*, *FTC v. Brown Shoe Co.*, 384 U.S. 316 (1966), the same Act that provides for "private enforcement" pursuant to its private right of action. *Cargill*, 479 U.S. at 109.

"enforcement activities" is limited to governmental regulators fails because the United States concedes that only a "preponderance" of the references supports its argument. Respondent's Brief at 20. Most importantly, the United States concedes that the particular statutory provision at issue, Section 101(25), "could be construed to include activities by [non-governmental] parties." Respondent's Brief at 20. *See also* 42 U.S.C. § 9622(f)(6)(C) (contemplating that "future enforcement action under section 106 or 107 of this title" may be taken by the government or by a private party that settles with the government). Moreover, the United States' statement that "whistleblowers" and citizens suit plaintiffs "enforce" CERCLA, Respondent's Brief at 15 n.12, demonstrates that governmental regulators are not the only enforcers of CERCLA. Like Key Tronic, those persons enforce CERCLA pursuant to the private right of action granted them in the statute. *Cf. Cargill*, 479 U.S. at 109. The United States has no persuasive argument that Key Tronic did not "enforce" CERCLA by carrying out CERCLA's *twin* goals of cleaning up the environment *and* assuring that all persons who pollute must pay for the cleanup.[12]

Last, the United States relies upon a committee report to make two incompatible arguments that Key Tronic did not "enforce" CERCLA. The report provides:

> The section also modifies the definition of "response action" to include related enforcement activities. The change will

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[12]The United States suggests that Key Tronic does not argue that attorneys' fees it expended in negotiating the Consent Decree are recoverable as costs of "enforcement activities." Respondent's Brief at 16 n.13. The United States is mistaken; Key Tronic made exactly that argument in its Opening Brief. *See* Petitioner's Brief at 20.

> confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties.

H.R. Rep. No. 99-253(I), 99th Cong., 2d Sess., pt. 1, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49. On the one hand, the United States seemingly contends that this report demonstrates that Congress actually intended to amend the meaning of "response action," a term used in Section 104(b), but mistakenly amended Section 101(25) instead. Respondent's Brief at 23 n.25, 25 n.28. A casual review of the entire committee report demonstrates, however, that Congress intended to amend the definition of "response," the term in Section 101(25), not "response action," the term used in Section 104(b)(1). *Accord* H.R. Conf. Rep. No. 99-962, 99th Cong., 2d Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278; H.R. Rep. No. 99-253(V), 99th Cong., 2d Sess., pt. 1, at 5-6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129. The United States' argument is thus factually meritless and is contrary to the statute's plain language.

On the other hand, based upon this same committee report, the United States inconsistently argues that Congress *did* intend to amend Section 101(25), but that it intended its amendment of that definitional section to benefit only the United States.[13] Key Tronic submits that the committee report supports the United States' argument, if at all, only by negative inference. Such a negative inference from a single

[13]Key Tronic agrees that Section 101(25), a definitional section, applies to the EPA. A committee report noting this unremarkable fact, however, in no way excludes application of a definitional section to other persons in the statute. *Cf. Ratzlaf*, 114 S. Ct. at 660 (single term should have single meaning throughout statute).

sentence of a committee report is insufficient to overcome Section 101(25)'s plain language, which unambiguously applies to all persons seeking to recover costs of "response." The United States fails to show that application of the statute's plain language produces results demonstrably at odds with Congress' express language. Accordingly, the statute's plain meaning must control. *Ron Pair Enterprises*, 489 U.S. at 242.

Key Tronic submits that the United States' arguments seeking to avoid application of the statute's plain language are unpersuasive and should be rejected. Section 101(25)'s definition of "response" applies to Key Tronic's action against the Air Force and that definition evinces Congress' intent that fees be awarded. The United States does not meet Key Tronic's argument that such a reading of the statute is supported by and furthers CERCLA's underlying policies. Respondent's Brief at 9 n.6 (dismissing Key Tronic's discussion of CERCLA's policy as of "little relevance.").[14] In this regard, Key Tronic has not argued that CERCLA's policy mandates the award of fees. Instead, Key Tronic submits that the interpretation of the statutory language to provide for an award of fees as enforcement activities is completely consistent with and furthers CERCLA's underlying policies.

The argument of the Sand Springs Superfund PRP Group that the award of fees will encourage intransigent litigation

[14]Indeed, while the United States sees these arguments as of "little relevance" when they favor Key Tronic's interpretation, the United States itself offers policy arguments to support its interpretation that Section 104(b)(1) (providing for recovery of "legal . . . studies" costs) provides it with a statutory basis to recover *its* fees under *Runyon* and *Alyeska*. Respondent's Brief at 14-15.

positions is neither persuasive nor well taken. The question before the Court is what Congress intended. In this regard, the "enforcement activities" language manifests Congress' intent that fees be recovered as "response" costs. Moreover, as more than one court has observed, that intent is furthered by providing attorneys' fees to persons who enforce CERCLA's goals. *See Donahey v. Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 126 L. Ed. 2d 594 (1993); *General Electric*, 920 F.2d at 1422.[15]

As discussed fully above, Congress manifested its intent that attorneys' fees be awarded as costs of "enforcement activities" to persons who bring suit to recover their "response" costs. That manifest intent is paramount and controls. Accordingly, the Ninth Circuit erred when it failed to give effect to Congress' intent, and its judgment should be reversed.

III. ATTORNEYS' FEES ARE OTHERWISE RECOVERABLE.

Even if the American Rule is held to bar recovery of attorneys' fees expended in the actual cost-recovery litigation, Key Tronic should still be entitled to recover

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[15]Even were there instances where awarding attorneys' fees might conceivably encourage intransigence by a cost-recovery plaintiff, a district court has ample means to address such problems if they arise. For example, under CERCLA, the district court is to award only "necessary" costs of response under Section 107(a)(4)(B). Independent of that control on attorneys' fees, Fed. R. Civ. P. 68 also provides protection to defendants. *See Marek v. Chesny*, 473 U.S. 1, 11 (1985) ("In a case where a rejected settlement offer exceeds the ultimate recovery, the plaintiff—although technically the prevailing party—has not received any monetary benefits from the post-offer services of his attorney.")

nonlitigation attorneys' fees as part of its "response" costs. There is no record support for the United States' contention that nonlitigation fees were incurred by Key Tronic to "criticiz[e] and oppos[e] a remedy proposed by the applicable government agency," and to "resist[] EPA's attempt to enforce the statute." Respondent's Brief at 28. Those factual contentions are insupportable.[16]

The district court found as follows:

> The court finds that the attorneys' fees and executive's opportunity costs in negotiating Key Tronic's consent decree are necessary response costs in cleaning up the Colbert landfill. The court cannot accept the Government's argument that such costs are not recoverable solely because attorneys (as opposed to engineers) carried out work necessary to solving the problems at Colbert. The court further notes that the Government does not contend that these fees are recoverable only as "enforcement activities." Because these expenses were necessary response costs, the

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[16]There is nothing in the record to support these factual statements. As set forth in Petitioner's Statement of Facts, Petitioner's Brief at 2-7, Key Tronic immediately admitted *its* responsibility for pollution at the Colbert Landfill and immediately took steps to address the harm to the environment and to ameliorate health hazards. The United States, on the other hand, did nothing and only belatedly met a portion of its CERCLA obligations, paying $1.45 million toward the cleanup costs in its "de minimis" settlement with the EPA against $4.2 million from Key Tronic, on account of Key Tronic's efforts to enforce CERCLA. Additionally, contrary to the United States' suggestion, Respondent's Brief at 3, Key Tronic objected to the Air Force's settlement with another federal agency, the EPA. CR 23, Ex. 2.

court finds that these costs are recoverable under CERCLA.

Pet. Cert. App. B-14, *Key Tronic*, 766 F. Supp. at 872-73.[17]

CERCLA provides for the recovery of costs incurred "to prevent, minimize, or mitigate damage to the public health or welfare or to the environment." 42 U.S.C. § 9601(23). The *FMC Corp.* conclusion that nonlitigation fees are recoverable costs of response, independent of the American Rule, is supported by the courts' construction of what constitute CERCLA response costs. *See, e.g., General Electric Co.*, 715 F. Supp. 949, 954-55 (W.D. Mo. 1989) (awarding attorneys' fees related to the "administrative" phase of the matter and consultant fees related to preparation of the Remedial Investigation and Feasibility Study and work plan), *aff'd*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991). This case is very similar to *General Electric Co.*. In both cases, the plaintiff took steps to ensure the "prompt cleanup of [a] hazardous waste site" 920 F.2d at 1422. In both cases, the defendant did not "participate[] in any of the investigation, evaluation, or cleanup of the site." *Id.* at 1417.

In short, the *FMC Corp.* rationale for awarding nonlitigation attorneys' fees as costs of response is wholly

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[17]Not only was this issue presented to and decided by the district court, the recoverability of nonlitigation attorneys' fees is also fairly subsumed within the questions presented on petition for writ of certiorari, as well as having been raised before the Ninth Circuit. Brief of Key Tronic Corporation, at 25-28, *Key Tronic Corp. v. United States*, Ninth Circuit No. 91-36021 (filed Mar. 13, 1992). Thus, Key Tronic's recovery of attorneys' fees under the rationale of *FMC Corp. v. Aero Industries, Inc.*, 998 F.2d 842 (10th Cir. 1993), is properly before the Court and a remand is appropriate if the Court adopts the *FMC* reasoning.

consistent with CERCLA's providing for recovery of response costs incurred to investigate contamination and implement cleanups. Key Tronic submits that if litigation attorneys' fees are not recoverable, under the American Rule, that nonlitigation fees are nonetheless recoverable as response costs and a remand for entry of a modified award under the parties' stipulation is appropriate.

IV. CONCLUSION

For the reasons stated, the Court should reverse the judgment of the Ninth Circuit and remand with instructions to (1) reinstate the district court judgment, (2) award fees and costs on appeal, and (3) calculate interest on the district court judgment.

PERKINS COIE

By
James R. Moore
Counsel of Record
Mark W. Schneider
Michael Himes

Attorneys for
Key Tronic
Corporation

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No. 93-376

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,
v.
UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JESS WOMACK
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, CA 90071
(213) 486-8780

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY G. GUTTERRIDGE
JAMES M. HARRIS
LAURINE E. TULEJA
555 West Fifth Street
Los Angeles, CA 90013

Counsel for Atlantic Richfield Company

* Counsel of Record

January 27, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amicus curiae will address the question whether Sections 101 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs."

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On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Atlantic Richfield Company ("ARCO") is one of the nation's largest integrated oil companies.[1] Because of its widespread oil operations, ARCO has been identified as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[2] at over 100 Superfund sites.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk of the Court.

[2] 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 (the "SARA Amendments"), Pub. L. No. 99-499, 100 Stat. 1613.

ARCO has a particular interest in the specific issues addressed in this case, because at a number of sites, ARCO has performed CERCLA cleanup work even though other parties were partially—or exclusively—responsible for the contamination, and thus, for the remediation, of the particular site. ARCO has completed remediation of ten sites in recent years, and has entered into numerous consent orders and decrees with EPA to clean up contamination caused by past disposal actions of some of its corporate predecessors.

To illustrate, ARCO is performing cleanup of the Sand Springs Petrochemical Complex Superfund Site ("the Sand Springs Site") in Sand Springs, Oklahoma, pursuant to a consent decree. The Sand Springs Site primarily consists of various pits, ponds, and lagoons contaminated by former refinery operations for which ARCO did not dispute responsibility. The remainder, identified by EPA as the Glenn Wynn Site, contained waste from an oil and solvents recycling operation that began operations after ARCO had ceased refining. The recycling operation was never owned or operated by ARCO.

Nonetheless, under its consent decree with EPA, ARCO is performing cleanup on the *entire* Sand Springs Site, including the Glenn Wynn Site, despite the fact that EPA records showed that over 700 other parties had shipped waste to the Glenn Wynn Site. ARCO alone completed the remediation of the Glenn Wynn Site in 1992, at a cost of over $9 million. To recover the response costs it incurred, ARCO instituted an action pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, against over 300 of the larger contributing liable parties who did not participate in the remediation. The district court held that ARCO was not entitled to recover the attorneys' fees it had expended in enforcing the obligations of other parties to pay response costs.

Thus, ARCO has an ongoing involvement and interest in the development of the growing body of law interpreting CERCLA generally and its provision concerning the recovery of response costs specifically. Moreover, the recoverability of CERCLA attorneys' fees can be expected to have a major impact on the willingness of private parties to undertake major remediation projects pursuant to consent decrees. Thus, the view of ARCO, as an *amicus curiae* significantly involved in the CERCLA process, should assist the Court in resolving this important issue of environmental law.

SUMMARY OF ARGUMENT

This case presents a straightforward and vital question of statutory construction: Does CERCLA authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs" pursuant to Section 107 of CERCLA? The answer does not lie, as the court of appeals assumed, in Congress' failure to use any "magic words," but rather, lies in the plain language of CERCLA. Here, CERCLA provides the necessary explicit statutory authorization that the "American Rule" requires for a party to be permitted to recover its attorneys' fees.

Congress has made plain that private parties, not just the government, enforce CERCLA. CERCLA permits private parties, in addition to individual States, Indian tribes, and the United States, to clean up hazardous wastes and, like the government, to bring lawsuits to enforce CERCLA's liability provisions against other responsible parties. 42 U.S.C. § 9607(a). Private parties may in such actions recover their "necessary costs of response," a term which CERCLA expansively defines to include "costs" of their "enforcement activities." *Id.* § 9601(25).

Sections 101 and 107, read together, provide explicit authorization for awarding attorneys' fees in private cost-recovery actions. That is because such an action is an "enforcement activity," the major "necessary cost" of which is attorneys' fees.

Any suggestion that only the government, and not private parties, may recover attorneys' fees under Section 107 disregards the fact that the definition of recoverable response costs was placed by Congress in a section of the statute of general applicability, not in a section that relates solely to the government. Likewise, the structure of the statute belies any assertion by the government that attorneys' fees are recoverable in actions to compel cleanups—which can be brought only by EPA—but not in cost-recovery actions. Further, reading "enforcement costs" to include attorneys' fees is wholly consistent with the purpose and structure of CERCLA, which seeks in large part to promote private remediation of hazardous waste contamination.

The court of appeals, ignoring this natural reading of the statute, imposed a requirement that Congress can authorize attorneys' fee awards only by using "magic words" such as "attorneys' fees" or an exact synonym.[3] No "magic words" are necessary, because Congress has made its intent clear in the text of CERCLA. This Court should give effect to that explicit intent by holding that private parties may recover attorneys' fees in cost-recovery actions under CERCLA.

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[3] *See Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993); *Key Tronic Corp.* v. *United States*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (Dec. 13, 1993) (No. 93-376). Both cases raise the attorneys' fees issue presented here, and both were decided by the same panel of the Ninth Circuit on the same day. *Stanton Road* was the lead decision and fully sets forth the analysis that was followed in both cases. Consequently, *amicus* will refer to that decision throughout this brief, even though the case before this Court on *certiorari* is the *Key Tronic* decision.

ARGUMENT

CERCLA EXPLICITLY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PRIVATE PARTY THAT ENFORCES CERCLA'S LIABILITY PROVISIONS.

Under the "American Rule," the prevailing party in a lawsuit may not recover its attorneys' fees absent "explicit [congressional] provisions for the allowance of attorneys' fees." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975); see also *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). In enacting and amending CERCLA, Congress made such "explicit provisions" for private parties to recover attorneys' fees incurred in cost-recovery actions. The language and context of CERCLA make plain that private parties may engage in "enforcement activities," the "necessary costs" of which are recoverable. And attorneys' fees cannot be construed as other than a "necessary cost" of a private party's cost-recovery action. Thus, although Congress did not use "magic words" in CERCLA, it nonetheless made explicit in the statute its intent that attorneys' fees may be awarded to prevent private litigants from suffering out-of-pocket losses in bringing cost-recovery actions.

A. Congress Amended CERCLA In 1986 To Encourage More Vigorous Enforcement By Private Parties, Not Just By The United States.

Congress enacted CERCLA "to provide the authority and resources to clean up hazardous substance releases." S. Rep. No. 11, 99th Cong., 1st Sess. 3 (1985) (Report of Senate Committee on Environment and Public Works). As this Court has observed, Congress sought to reach this goal through a two-pronged approach that "provides a mechanism for cleaning up hazardous waste sites, . . . and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989).[4]

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[4] *See also* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038 (Report of

To accomplish these twin goals, CERCLA contains "sweeping" liability provisions, making liable for remediation expenses "*everyone* who is potentially responsible for hazardous-waste contamination." 491 U.S. at 21 (plurality opinion) (emphasis in original). Thus, Section 107(a) designates broad categories of parties who may be liable for remediation expenses, often referred to generally as potentially responsible parties, or PRPs. 42 U.S.C. § 9607(a).

Congress recognized, however, that the mere threat of potential liability would not, standing alone, always motivate PRPs to engage in the cleanup of hazardous waste CERCLA was enacted to achieve. Consequently, Congress included in CERCLA a cost-recovery scheme, *Union Gas*, 491 U.S. at 7, that is central to the accomplishment of CERCLA's purposes. See *id.* at 21 (plurality opinion).

Governmental cleanup and cost recovery constitute one element of this cost-recovery scheme. CERCLA Section 104 authorizes the United States or a State to clean up a contaminated site. The appropriate governmental entity may then bring a cost-recovery action against any PRP under Section 107(a)(4)(A).

Congress understood that CERCLA's goals would not be met if the government were the only party to conduct cleanups. "[T]he Government's resources being finite, it [can] neither pay up front all necessary cleanups nor undertake many different projects at the same time." *Union Gas*, 491 U.S. at 21 (plurality opinion). Congress accordingly created incentives for private cleanups by "allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties." *Id.* at 21-22. To this end, CERCLA

House Committee on the Judiciary) (purposes of CERCLA "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

provides that private parties may take action to respond to releases of hazardous substances. See 42 U.S.C. § 9604(a)(1).[5] In a subsection separate from that authorizing governmental cost recovery, private parties are also authorized to bring an action against other PRPs to recover "any other necessary costs of response incurred by the [suing party] consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986 ("the SARA Amendments"). In these amendments, Congress was determined to increase the private enforcement of CERCLA to remedy EPA's "appalling failures" in administering the program. H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 56 (1985), *reprinted in* 1986 U.S.C.C.AN. 2835, 2838 (Report of House Committee on Energy and Commerce). EPA's prior enforcement of CERCLA had been

> victimized by gross mismanagement and policies which limited expenditures for site cleanups . . . .

[5] Although Section 104(a)(1) relates to private cleanup effected under EPA's direction, "[t]his provision is not intended to preclude or discourage responsible parties from conducting cleanup actions without the formal permission of the Federal government." H.R. Rep. No. 253, 99th Cong., 1st sess., pt. I, at 67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2849 (Report of House Energy and Commerce Committee). Therefore, it is widely recognized that a party that has acted to clean up hazardous wastes, even though not under EPA's direction, may maintain a Section 107 cost-recovery action. *See, e.g., Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Cadillac Fairview/California, Inc.* v. *Dow Chem. Co.*, 840 F.2d 691 (9th Cir. 1988); *Richland-Lexington Airport Dist.* v. *Atlas Properties, Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990); *but see Bulk Distribution Ctrs., Inc.* v. *Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984) (a private plaintiff may not bring a cost-recovery suit unless the government has also incurred response costs with respect to the site). Indeed, in this case, Key Tronic voluntarily took remedial action, and then sought to require other responsible parties to pay their fair share of the cost of remediation.

> As a result of [Congressional Subcommittee investigations], over twenty top-level officials, including the Administrator of EPA, resigned or were fired from their jobs . . . . Understandably, the combination of promises which could never be kept with the limited resources available and the gross mismanagement of the program, have created mistrust in the public and in Congress.

Id. at 55.

EPA's abject failures, combined with the expectation that "EPA will never have adequate monies or manpower to address the problem," led Congress to conclude that it "must facilitate cleanups of hazardous substances by the responsible parties . . .,"[6] *id.*, and "encourage private party cleanup at all sites."[7] *Id.* at 2883. Indeed, 60 percent of all cleanups are conducted by private parties.[8]

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[6] In light of Congress' strongly expressed disappointment, at the time of the SARA Amendments, with EPA's performance in implementing CERCLA, the United States cannot plausibly assert that Congress continued to expect EPA to play the primary role in carrying out CERCLA's "enforcement activities."

[7] This private enforcement aspect of CERCLA is not unique; this Court has repeatedly acknowledged that the ability to enforce federal rights is not limited to governmental actors. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court observed that "Congress has [often] opted to rely heavily on private enforcement to implement public policy." *Id.* at 263. The civil rights statutes, 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 also provide examples of statutes in which Congress has authorized private enforcement of federal rights. *Cf. Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 109 (1989). *Id.* at 109 ("We agree with the petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983"). Similarly, a private Section 107 action enforces CERCLA's liability provisions against responsible parties.

[8] *See* Office of Emergency & Remedial Response, U.S. Environmental Protection Agency, *Progress Toward Implementing SUPERFUND, Fiscal Year 1990* 15 (Feb. 1992).

B. Congress' Intent To Authorize Attorneys' Fees Awards Is Made Explicit In Section 101 Of CERCLA.

In determining whether CERCLA authorizes attorneys' fees in private cost-recovery actions, the starting point is, of course, the statute's language. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990). In the 1986 SARA Amendments, Congress expanded the definition of response costs that private parties may recover to read as follows: "the terms 'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).[9] This definition of recoverable "response" costs necessarily and unambiguously encompasses attorneys' fees.

Courts—including the court below—have recognized that a natural reading of " 'costs' of 'enforcement activities' " includes attorneys' fees: "[a]ttorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel." *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Similarly, the Eighth Circuit has observed: "Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it would strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

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[9] Prior to 1986, the term "response" was defined as meaning "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25) (1982). The SARA amendments added: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (1988).

This natural reading of "enforcement costs" is squarely supported by the terms' context. Enforcement of a party's liability obligations is a CERCLA "enforcement activity" as clearly as is enforcing a party's obligation to conduct a cleanup. Indeed, the only "enforcement activity" a private party may take under CERCLA Section 107 is enforcement—through a lawsuit—of another party's liability for response costs under that section.[10]

And because the primary cost to a private party of bringing a lawsuit is attorneys' fees, the right to recover the "costs" of "enforcement activities" would be largely meaningless unless it included the right to recover attorneys' fees.[11] It is axiomatic that a statute must be construed so as to give effect to *all* its terms. *Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 7 (U.S. Jan. 24, 1994) (" 'statute should be interpreted so as not to render one part inoperative' ") (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)); *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 369 n.14 (1986).[12]

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[10] As the Eighth Circuit recognized, a "private party cost-recovery action . . . is an enforcement activity within the meaning of the statute." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *see also Stanton Road*, 984 F.2d at 1023 (" 'enforcement' of CERCLA by a private party consists in suing to hold the polluter liable") (Canby, J., dissenting).

[11] A party may incur other expenses in litigation, such as docket, witness, and transcription fees. Had Congress intended to enable private parties to recover litigation expenses *other* than attorneys' fees, Section 107(a)(4)(B) would be unnecessary. A party may recoup most such litigation expenses as statutorily defined "costs" under 28 U.S.C. § 1920.

[12] *See Stanton Road*, 984 F.2d at 1023 ("When Congress amended CERCLA to permit such private litigants, among others, to recover the 'costs' of 'enforcement activities,' it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. . . . If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable") (Canby, J., dissenting).

Failure to permit parties that provide remediation to recover their full costs of enforcement creates perverse disincentives to cooperative cleanup of hazardous sites, a result wholly at odds with Congress' objectives in enacting CERCLA. If attorneys' fees are not recoverable as costs of "enforcement activities," then a recalcitrant PRP can threaten to prolong the litigation in a way that will reduce significantly the real ability of a party to recover its full response costs. Thus, the expense of attorneys' fees will become a bargaining chip by those PRPs less willing to carry their full share of responsibility for cleaning up a particular site. No reason exists to reward that kind of behavior. Moreover, it is fanciful to assume that the inability to recover full out-of-pocket costs will not affect every PRP's willingness to agree to incur significant cleanup expenses in the first place. Thus, the primary goal of ensuring prompt remediation of hazardous sites is directly harmed by the rule adopted by the court of appeals in this case. Accordingly, *amicus*' interpretation of Sections 101 and 107 is clearly preferable because it alone "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988).[13]

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[13] The case decided by the Eighth Circuit, *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991), provides an excellent example of this problem. There, Litton was responsible for *all* of the hazardous wastes at the site in question. Nevertheless, it never cooperated in any aspect of the proposed and implemented remediation of that site. It then refused to negotiate a reasonable settlement of the actual costs, and postponed reimbursement of those costs for five years while pursuing through litigation *all the way to this Court* strikingly weak arguments on the merits of Litton's duty to remediate. General Electric's attorneys' fees in prosecuting that action through three levels of the federal judiciary were unquestionably significant. Had GE not recovered its out-of-pocket costs, including its outside legal fees, its actual recovery for volunteering to remedy the site would have been woefully inadequate.

It is thus clear beyond doubt that Congress provided in private Section 107 cost-recovery actions the explicit authorization to award attorneys' fees that this Court found missing in both *Alyeska* and *Runyon*. See *infra* pp. 16-19. Various arguments have been advanced in the lower courts to overcome this conclusion, but each is unavailing.

1. It has been argued, based on scant legislative history,[14] that Congress intended for only the government, and not private parties, to recover attorneys' fees. This argument is refuted by the language and structure of the statute itself.

In the SARA Amendments, Congress placed the "enforcement" language in Section 101, a general definitional section that applies to *all* parties—both governmental and private—acting under the remedial provision of Section 107. 42 U.S.C. § 9601(25). Had Congress intended to limit the recovery of attorneys' fees to the government, it would not have placed the "enforcement" language in a provision of general applicability. Rather, the logical

[14] The sole support for the argument that Congress intended the "enforcement" language to cover attorneys' fees, but only EPA's attorneys' fees, is *Part I* of a House Report: "The section also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49 (Report of House Committee on Energy and Commerce). However, *Part V* of this same report mentions the "enforcement" language without any limitation to EPA: "Subsection (d) amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. V, at 6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129 (Report of House Committee on Public Works and Transportation). Importantly, the *conference* report attached to the bill that ultimately was enacted into law does not even mention EPA. H. Conf. Rep. No. 962, 99th Cong., 1st Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

course would have been to insert the "enforcement activities" language into the CERCLA cost-recovery section applicable only to the government, Section 107(a)(4)(A), or expressly qualify the language in Section 101(25) to make plain that the definition was limited to actions taken by the government. That Congress followed neither of these courses further confirms the natural reading of the statute: attorneys' fee awards are authorized in *all* cost-recovery actions, private and governmental alike.

2. The United States has previously made the related argument that the term "enforcement activities" does not describe cost-recovery actions, but only actions to compel a PRP to conduct a cleanup, which can be brought exclusively by the government under Sections 104 and 106. But once again, that argument cannot be squared with Congress' decision to place the "enforcement activities" language in a section applicable to *both* the government and private parties.

Furthermore, if accepted, this argument would lead to the conclusion that the United States may recover attorneys' fees only when it brings suit to enjoin parties to conduct cleanups. Yet the United States regularly seeks and obtains its attorneys' fees incurred in actions brought under Section 107 to recover costs for cleanups that it has conducted itself. See, *e.g.*, *United States* v. *Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) (relying on Section 101(25) to award EPA the attorneys' fees it incurred in bringing a Section 107(a) cost-recovery action); *United States* v. *Northernaire Plating Co.*, 685 F. Supp. 1410, 1412-13, 1417-18 (W.D. Mich. 1988) (United States conducted cleanup action and then brought Section 107 action to recover its costs, including attorneys' fees incurred in the cost-recovery action). Because private parties, like the government, bring cost-recovery actions under Section 107, that section provides *identical*

relief to both. Costs of "enforcement activities" can have only one meaning.[15]

3. Section 104(b)(1), entitled "Information; Studies and Investigations," authorizes the federal government to perform environmental studies and investigations (including legal investigations).[16] But the government has argued that by using the term "legal" in a section of CERCLA that pertains to the government, Congress manifested an intention that attorneys' fees not be recoverable in private cost-recovery actions.

This argument is nothing more than a *non sequitur* that disregards the plain language of Section 107. Section 107 on its own defines cost-recovery actions and creates the liability for "any other necessary costs of response."[17] Nothing in Section 104(b) serves to limit the rights Section 107 explicitly confers on *all* actors enforcing CERCLA.

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[15] It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992). "Ascribing various meanings to a single iteration of [costs of enforcement activities]—reading the word differently for each [category of party] to which it applies—would open Pandora's jar." *Ratzlaf* v. *United States*, No. 92-1196, 62 U.S.L.W. 4037, 4039 (U.S. Jan. 11, 1994) (citation omitted). *Accord, Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 9 (U.S. Jan. 24, 1994).

[16] Section 104(b)(1) provides in part:

> the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9604(b)(1).

[17] "Section 107 of CERCLA sets forth the provisions imposing liability for the cost of hazardous substance clean-ups under the Act." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 17 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3040 (Report of House Committee on the Judiciary).

Further, the government misconstrues the function of Section 104(b)(1) in the CERCLA scheme. Section 104(b)(1) does not, as the government supposes, authorize it to recover its attorneys' fees in cost-recovery actions.[18] Rather, as its title indicates, this section serves only to provide authority for the federal government to conduct three distinct types of investigations and studies related to the cleanup goals of CERCLA, namely, studies (1) to plan and direct response actions, (2) to recover the costs of response actions, and (3) to enforce CERCLA.

But CERCLA provides the authority to conduct each of the activities to which the studies relate in *separate* sections.[19] Consequently, Section 104(b) can be construed to provide the actual authority for those activities, as opposed merely to authorizing studies and investigations, only by reading it to be redundant of other CERCLA provisions. This is plainly unwarranted.

4. Finally, awarding attorneys' fees here does not depend upon the type of "policy" analysis forbidden by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Alyeska* prohibits an award of attorneys' fees based solely on "the courts' assessment of the importance of the public policies involved in particular cases." *Id.* at 269. Here, by contrast, a clear statutory basis exists for making such an award: as shown

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[18] Even if one accepts the notion that Section 104 authorizes an award of attorneys' fees to the government, private parties are nonetheless entitled to awards of attorneys' fees incurred in bringing cost-recovery actions under Section 107, as petitioner has convincingly demonstrated.

[19] The authority to plan and direct response actions is found in Section 104(a) (42 U.S.C. § 9604(a)) and Section 121 (42 U.S.C. § 9621); the authority to recover costs is found in Section 107(a)(4)(B) (42 U.S.C. § 9607(a)(4)(B)); and the authority to enforce CERCLA is found in a variety of sections, including, among others, Sections 104(a) (42 U.S.C. § 9604(a)), 106(a) (42 U.S.C. § 9606(a)), and 107(a) (42 U.S.C. § 9607(a)).

above, the text of CERCLA explicitly authorizes private parties to recover their "response costs," including all "costs" of "enforcement activities."

It is unsurprising that the policy concerns that motivated Congress in enacting and later strengthening CERCLA are also served by a recognition that private parties may recover attorneys' fees under Section 107. As fee awards will promote CERCLA's fundamental goal of encouraging private remediation of hazardous waste contamination, this application of Sections 107 and 101(25) appropriately gives effect to the plain language of the statute *and* harmonizes CERCLA's specific provisions with its general underlying goals. This Court has counseled that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see also *Department of Revenue* v. *ACF Indus., Inc., supra*, slip op. at 9-10.

In sum, private parties invoke Section 107 in precisely the same way the United States does when it seeks to collect CERCLA response costs. Given that private parties have the right to bring cost-recovery actions under CERCLA, that both the government and private parties look to the same provision for recovery of response costs, and that the definition of "response" is the same for all parties pursuing an action under Section 107, CERCLA provides clear authority for recovery of attorneys' fees.

C. Congress' Intent In CERCLA To Permit Private Parties To Recover Their Attorneys' Fees Is Clear, And No Particular "Magic Words" Are Required.

Contrary to the decisions of the Sixth and the Eighth Circuits,[20] the court of appeals concluded—with one judge

[20] *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *accord, Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 114 S. Ct. 636 (1993).

dissenting—that CERCLA does not authorize private parties to recover attorneys' fees as a cost of "enforcement" in cost-recovery actions. *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Relying on *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the court concluded that "the words 'necessary costs of response' do not expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property." *Stanton Road*, 984 F.2d at 1019. That reliance was misplaced; the majority erred in reading *Alyeska* and *Runyon* as establishing a wooden rule that attorneys' fees may be awarded only if the underlying statute *expressly* contains the terms "attorneys' fees" or "legal costs," regardless of Congress' actual intent expressed in the statute. *Stanton Road*, 984 F.2d at 1019.

Alyeska held that, under the American Rule, attorneys' fees may not be awarded under a private attorney general theory merely because a litigant has vindicated an important public interest. To the contrary, the Court explained, attorneys' fees generally are to be awarded only when Congress has adopted an "explicit provision" for such an award. 421 U.S. at 260.

Nothing in *Alyeska* bars an attorneys' fees award to a private party in a CERCLA case. Unlike the present case, the prevailing party in *Alyeska* did not rely on *any* statute as the basis for a fees award. By contrast, CERCLA *explicitly* authorizes private parties not only to act as "private attorneys general," but also to recover all "necessary costs" of doing so.

This case is also very different from *Runyon*. There, the petitioner claimed that 42 U.S.C. § 1988 "implicitly"

authorized an award of attorneys' fees to a successful litigant bringing a case under 42 U.S.C. § 1981, part of the Civil Rights Act of 1866. 427 U.S. at 184. The petitioner argued that Section 1988's broad remedial purpose, which "authorize[s] federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law," [21] *id.* at 185 (quoting *Moor* v. *County of Alameda*, 411 U.S. 693, 702-03 (1973)), required such an award. This Court rejected the argument that such "generalized commands," 427 U.S. at 186, constituted an "explicit congressional authorization . . . [of] attorneys' fees." *Id.* at 185.

No such "generalized commands" are at issue here. Instead, Congress chose to use language in CERCLA—authorizing recovery of "necessary costs of response," 42 U.S.C. § 9607(a)(4)(B), and defining "response" to include "enforcement activities," *id.* § 9601(25)—that makes clear Congress' intent to permit the recovery of attorneys' fees.[22]

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[21] The section then provided:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of . . . [the] cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988, *quoted in Runyon* v. *McCrary*, 427 U.S. 160, 184 (1976).

[22] Moreover, the majority of the court of appeals ignored entirely this Court's reasoning in *Runyon*. The *Runyon* Court did not begin

The court below not only failed to observe the crucial contrast between the statute involved in *Runyon* and the language of CERCLA, but also distorted *Runyon*'s requirement of an "explicit" statutory authorization for an award of attorneys' fees. The majority erroneously converted the "explicit" requirement into a rule that Congress must use certain "magic words." Elevating form over substance, the court concluded in effect that attorneys' fees may be awarded only if a statute "expressly" mentions that term or an exact synonym, even if, employing conventional statutory construction, the statute "explicitly" or "clearly" reflects Congress' intention to allow fees awards. *Stanton Road*, 984 F.2d at 1019.

That the correct approach is to ascertain Congress' explicit intent rather than search for "magic words" is confirmed by *both* cases in which this Court has previously considered analogous problems under CERCLA. In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), this Court held that CERCLA abrogated the States' Eleventh Amendment immunity from suits for monetary damages. *Id.* at 10. Beginning with the well established constitutional tenet that Congress may override the States' Eleventh Amendment immunity only when it makes "its intent

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and end its inquiry by searching the statute in question for the words "attorneys' fees." Had it taken that appoach, its opinion would have been very brief, for the Civil Rights Act of 1866 indisputably contained no such term. Instead, the *Runyon* Court construed the 1866 Act employing traditional tools to determine Congress' actual intent concerning attorneys' fees. 427 U.S. at 184-86. After examining the statutory text, the Court examined prior case law and the legislative history, and concluded that "nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended." *Id.* at 184-85. The *Runyon* Court thus looked to the statutory language first, and confirmed its conclusion by reference to the context and purpose of the statute as a whole; the Court pointedly did *not* require the issue to be approached by Congress using any particular formulation. In this case, such an analysis results in the conclusion that CERCLA *does* authorize the recovery of attorneys' fees by private parties, as discussed above.

to do so 'unmistakably clear,'" this Court examined CERCLA as a whole and concluded that it displayed the requisite clarity of intent, even though the statute never mentioned the Eleventh Amendment. *Union Gas* decisively rejected the argument that Congress could abrogate the Eleventh Amendment only by using statutory language similar to language it had previously employed, stating: "If no magic words are required for abrogation, then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language." *Id.* at 13 n.4. Likewise, in *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 363 (1986), this Court held that portions of CERCLA "express[ly]" preempted state law even though the critical statutory language was "inartful" and "not a model of legislative draftsmanship."

* * * *

CERCLA's plain language authorizes an award of attorneys' fees in private cost-recovery actions. No other construction of CERCLA makes either linguistic or rational sense. In Section 107, Congress permitted *private parties* to recover "response costs." In Section 101, Congress defined that term to include the "costs" of "enforcement activities." Because a private cost-recovery action is an "enforcement activity," and because the major cost incurred in that enforcement activity is attorneys' fees, Sections 101 and 107 of CERCLA can only be read to permit a private party to recover its attorneys' fees expended in a cost-recovery action. The court below erred, both as a matter of logic and as a matter of statutory interpretation, in insisting that Congress can authorize attorneys' fees awards only through the use of "magic words."

The provisions of CERCLA thus decidedly fulfill the requirements for an exception to the American Rule. But it should be recognized that a party's pursuit of its attorneys' fees in a Section 107 action does *not* fit the usual circumstances under which the American Rule generally

applies. The United States' legal system, in contrast to others, considers the party to have been "made whole" upon recovery of damages, *without* recovering attorneys' fees. See generally *Alyeska*, 421 U.S. at 261. Typically, therefore, a prevailing party seeks to recover its attorneys' fees as part of its expenses; the fees award is thus an adjunct to the damages the party has already recovered, not a part of the underlying claim on the merits. This typical situation is altered for the CERCLA plaintiff in a cost-recovery action: The language and structure of CERCLA make clear that "costs" of "enforcement activities"—which must necessarily encompass attorneys' fees—themselves constitute *part of the party's damages.*

Accordingly, it should come as no surprise that Congress did not express its intention to allow attorneys' fees to be recovered by private parties by using the classic terms traditionally employed in other federal statutes to shift attorneys' fees from a plaintiff to a defendant. The unique nature of claims under Section 107 explains the equally unique formulation Congress employed to confer an express right to attorneys' fees as part of private enforcement actions. What dictates the proper outcome of the case is that the language in Sections 101 and 107 is sufficiently plain to provide an exception to the American Rule even for a typical federal statute; it follows *a fortiori* that the language is sufficient to entitle a private party to recover attorneys' fees in the relatively unusual circumstances created by CERCLA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals, and hold that private parties may recover attorneys' fees under CERCLA.

Respectfully submitted,

JESS WOMACK
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, CA 90071
(213) 486-8780

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY G. GUTTERRIDGE
JAMES M. HARRIS
LAURINE E. TULEJA
555 West Fifth Street
Los Angeles, CA 90013

Counsel for Atlantic Richfield Company

January 27, 1994

* Counsel of Record

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

KEY TRONIC CORPORATION,
Petitioner,
v.
UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

JESS WOMACK
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, CA 90071
(213) 486-8780

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY G. GUTTERRIDGE
JAMES M. HARRIS
LAURINE E. TULEJA
555 West Fifth Street
Los Angeles, CA 90013

Counsel for Atlantic Richfield Company

* Counsel of Record

January 27, 1994

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTION PRESENTED

Amicus curiae will address the question whether Sections 101 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA") authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs."

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-376

KEY TRONIC CORPORATION,
Petitioner,

v.

UNITED STATES, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF ATLANTIC RICHFIELD COMPANY AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

STATEMENT OF INTEREST OF *AMICUS CURIAE*

Atlantic Richfield Company ("ARCO") is one of the nation's largest integrated oil companies.[1] Because of its widespread oil operations, ARCO has been identified as a potentially responsible party ("PRP") under the Comprehensive Environmental Response, Compensation and Liability Act ("CERCLA")[2] at over 100 Superfund sites.

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[1] Pursuant to Rule 37.3 of the Rules of this Court, this brief is filed with the consent of the parties. Copies of the consent letters are on file with the Clerk of the Court.

[2] 42 U.S.C. §§ 9601-9675, as amended by the Superfund Amendments and Reauthorization Act of 1986 (the "SARA Amendments"), Pub. L. No. 99-499, 100 Stat. 1613,

ARCO has a particular interest in the specific issues addressed in this case, because at a number of sites, ARCO has performed CERCLA cleanup work even though other parties were partially—or exclusively—responsible for the contamination, and thus, for the remediation, of the particular site. ARCO has completed remediation of ten sites in recent years, and has entered into numerous consent orders and decrees with EPA to clean up contamination caused by past disposal actions of some of its corporate predecessors.

To illustrate, ARCO is performing cleanup of the Sand Springs Petrochemical Complex Superfund Site ("the Sand Springs Site") in Sand Springs, Oklahoma, pursuant to a consent decree. The Sand Springs Site primarily consists of various pits, ponds, and lagoons contaminated by former refinery operations for which ARCO did not dispute responsibility. The remainder, identified by EPA as the Glenn Wynn Site, contained waste from an oil and solvents recycling operation that began operations after ARCO had ceased refining. The recycling operation was never owned or operated by ARCO.

Nonetheless, under its consent decree with EPA, ARCO is performing cleanup on the *entire* Sand Springs Site, including the Glenn Wynn Site, despite the fact that EPA records showed that over 700 other parties had shipped waste to the Glenn Wynn Site. ARCO alone completed the remediation of the Glenn Wynn Site in 1992, at a cost of over $9 million. To recover the response costs it incurred, ARCO instituted an action pursuant to Section 107 of CERCLA, 42 U.S.C. § 9607, against over 300 of the larger contributing liable parties who did not participate in the remediation. The district court held that ARCO was not entitled to recover the attorneys' fees it had expended in enforcing the obligations of other parties to pay response costs.

Thus, ARCO has an ongoing involvement and interest in the development of the growing body of law interpreting CERCLA generally and its provision concerning the recovery of response costs specifically. Moreover, the recoverability of CERCLA attorneys' fees can be expected to have a major impact on the willingness of private parties to undertake major remediation projects pursuant to consent decrees. Thus, the view of ARCO, as an *amicus curiae* significantly involved in the CERCLA process, should assist the Court in resolving this important issue of environmental law.

SUMMARY OF ARGUMENT

This case presents a straightforward and vital question of statutory construction: Does CERCLA authorize an award of attorneys' fees to a private party that enforces another party's statutory obligation to pay its share of "response costs" pursuant to Section 107 of CERCLA? The answer does not lie, as the court of appeals assumed, in Congress' failure to use any "magic words," but rather, lies in the plain language of CERCLA. Here, CERCLA provides the necessary explicit statutory authorization that the "American Rule" requires for a party to be permitted to recover its attorneys' fees.

Congress has made plain that private parties, not just the government, enforce CERCLA. CERCLA permits private parties, in addition to individual States, Indian tribes, and the United States, to clean up hazardous wastes and, like the government, to bring lawsuits to enforce CERCLA's liability provisions against other responsible parties. 42 U.S.C. § 9607(a). Private parties may in such actions recover their "necessary costs of response," a term which CERCLA expansively defines to include "costs" of their "enforcement activities." *Id.* § 9601(25).

Sections 101 and 107, read together, provide explicit authorization for awarding attorneys' fees in private cost-recovery actions. That is because such an action is an "enforcement activity," the major "necessary cost" of which is attorneys' fees.

Any suggestion that only the government, and not private parties, may recover attorneys' fees under Section 107 disregards the fact that the definition of recoverable response costs was placed by Congress in a section of the statute of general applicability, not in a section that relates solely to the government. Likewise, the structure of the statute belies any assertion by the government that attorneys' fees are recoverable in actions to compel cleanups—which can be brought only by EPA—but not in cost-recovery actions. Further, reading "enforcement costs" to include attorneys' fees is wholly consistent with the purpose and structure of CERCLA, which seeks in large part to promote private remediation of hazardous waste contamination.

The court of appeals, ignoring this natural reading of the statute, imposed a requirement that Congress can authorize attorneys' fee awards only by using "magic words" such as "attorneys' fees" or an exact synonym.[3] No "magic words" are necessary, because Congress has made its intent clear in the text of CERCLA. This Court should give effect to that explicit intent by holding that private parties may recover attorneys' fees in cost-recovery actions under CERCLA.

[3] *See Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993); *Key Tronic Corp.* v. *United States*, 984 F.2d 1025 (9th Cir.), *cert. granted*, 114 S. Ct. 633 (Dec. 13, 1993) (No. 93-376). Both cases raise the attorneys' fees issue presented here, and both were decided by the same panel of the Ninth Circuit on the same day. *Stanton Road* was the lead decision and fully sets forth the analysis that was followed in both cases. Consequently, *amicus* will refer to that decision throughout this brief, even though the case before this Court on *certiorari* is the *Key Tronic* decision.

ARGUMENT

CERCLA EXPLICITLY AUTHORIZES AN AWARD OF ATTORNEYS' FEES TO A PRIVATE PARTY THAT ENFORCES CERCLA'S LIABILITY PROVISIONS.

Under the "American Rule," the prevailing party in a lawsuit may not recover its attorneys' fees absent "explicit [congressional] provisions for the allowance of attorneys' fees." *Alyeska Pipeline Serv. Co.* v. *Wilderness Soc'y*, 421 U.S. 240, 260 (1975); see also *Runyon* v. *McCrary*, 427 U.S. 160, 185 (1976). In enacting and amending CERCLA, Congress made such "explicit provisions" for private parties to recover attorneys' fees incurred in cost-recovery actions. The language and context of CERCLA make plain that private parties may engage in "enforcement activities," the "necessary costs" of which are recoverable. And attorneys' fees cannot be construed as other than a "necessary cost" of a private party's cost-recovery action. Thus, although Congress did not use "magic words" in CERCLA, it nonetheless made explicit in the statute its intent that attorneys' fees may be awarded to prevent private litigants from suffering out-of-pocket losses in bringing cost-recovery actions.

A. Congress Amended CERCLA In 1986 To Encourage More Vigorous Enforcement By Private Parties, Not Just By The United States.

Congress enacted CERCLA "to provide the authority and resources to clean up hazardous substance releases." S. Rep. No. 11, 99th Cong., 1st Sess. 3 (1985) (Report of Senate Committee on Environment and Public Works). As this Court has observed, Congress sought to reach this goal through a two-pronged approach that "provides a mechanism for cleaning up hazardous waste sites, . . . and imposes the costs of the cleanup on those responsible for the contamination." *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1, 7 (1989).[4]

[4] *See also* H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 15 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 3038 (Report of

To accomplish these twin goals, CERCLA contains "sweeping" liability provisions, making liable for remediation expenses "*everyone* who is potentially responsible for hazardous-waste contamination." 491 U.S. at 21 (plurality opinion) (emphasis in original). Thus, Section 107(a) designates broad categories of parties who may be liable for remediation expenses, often referred to generally as potentially responsible parties, or PRPs. 42 U.S.C. § 9607(a).

Congress recognized, however, that the mere threat of potential liability would not, standing alone, always motivate PRPs to engage in the cleanup of hazardous waste CERCLA was enacted to achieve. Consequently, Congress included in CERCLA a cost-recovery scheme, *Union Gas*, 491 U.S. at 7, that is central to the accomplishment of CERCLA's purposes. See *id.* at 21 (plurality opinion).

Governmental cleanup and cost recovery constitute one element of this cost-recovery scheme. CERCLA Section 104 authorizes the United States or a State to clean up a contaminated site. The appropriate governmental entity may then bring a cost-recovery action against any PRP under Section 107(a)(4)(A).

Congress understood that CERCLA's goals would not be met if the government were the only party to conduct cleanups. "[T]he Government's resources being finite, it [can] neither pay up front all necessary cleanups nor undertake many different projects at the same time." *Union Gas*, 491 U.S. at 21 (plurality opinion). Congress accordingly created incentives for private cleanups by "allowing private parties who voluntarily cleaned up hazardous-waste sites to recover a proportionate amount of the costs of cleanup from the other potentially responsible parties." *Id.* at 21-22. To this end, CERCLA

House Committee on the Judiciary) (purposes of CERCLA "(1) to provide for clean-up if a hazardous substance is released into the environment or if such release is threatened, and (2) to hold responsible parties liable for the costs of these clean-ups").

provides that private parties may take action to respond to releases of hazardous substances. See 42 U.S.C. § 9604(a)(1).[5] In a subsection separate from that authorizing governmental cost recovery, private parties are also authorized to bring an action against other PRPs to recover "any other necessary costs of response incurred by the [suing party] consistent with the national contingency plan." 42 U.S.C. § 9607(a)(4)(B).

In 1986, Congress amended CERCLA by enacting the Superfund Amendments and Reauthorization Act of 1986 ("the SARA Amendments"). In these amendments, Congress was determined to increase the private enforcement of CERCLA to remedy EPA's "appalling failures" in administering the program. H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 56 (1985), *reprinted in* 1986 U.S.C.C.AN. 2835, 2838 (Report of House Committee on Energy and Commerce). EPA's prior enforcement of CERCLA had been

> victimized by gross mismanagement and policies which limited expenditures for site cleanups . . . .

[5] Although Section 104(a)(1) relates to private cleanup effected under EPA's direction, "[t]his provision is not intended to preclude or discourage responsible parties from conducting cleanup actions without the formal permission of the Federal government." H.R. Rep. No. 253, 99th Cong., 1st sess., pt. I, at 67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2849 (Report of House Energy and Commerce Committee). Therefore, it is widely recognized that a party that has acted to clean up hazardous wastes, even though not under EPA's direction, may maintain a Section 107 cost-recovery action. *See, e.g., Tanglewood East Homeowners* v. *Charles-Thomas, Inc.*, 849 F.2d 1568 (5th Cir. 1988); *Cadillac Fairview/California, Inc.* v. *Dow Chem. Co.*, 840 F.2d 691 (9th Cir. 1988); *Richland-Lexington Airport Dist.* v. *Atlas Properties, Inc.*, 901 F.2d 1206, 1208-09 (4th Cir. 1990); *but see Bulk Distribution Ctrs., Inc.* v. *Monsanto Co.*, 589 F. Supp. 1437 (S.D. Fla. 1984) (a private plaintiff may not bring a cost-recovery suit unless the government has also incurred response costs with respect to the site). Indeed, in this case, Key Tronic voluntarily took remedial action, and then sought to require other responsible parties to pay their fair share of the cost of remediation.

> As a result of [Congressional Subcommittee investigations], over twenty top-level officials, including the Administrator of EPA, resigned or were fired from their jobs . . . . Understandably, the combination of promises which could never be kept with the limited resources available and the gross mismanagement of the program, have created mistrust in the public and in Congress.

Id. at 55.

EPA's abject failures, combined with the expectation that "EPA will never have adequate monies or manpower to address the problem," led Congress to conclude that it "must facilitate cleanups of hazardous substances by the responsible parties . . .,"[6] *id.*, and "encourage private party cleanup at all sites."[7] *Id.* at 2883. Indeed, 60 percent of all cleanups are conducted by private parties.[8]

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[6] In light of Congress' strongly expressed disappointment, at the time of the SARA Amendments, with EPA's performance in implementing CERCLA, the United States cannot plausibly assert that Congress continued to expect EPA to play the primary role in carrying out CERCLA's "enforcement activities."

[7] This private enforcement aspect of CERCLA is not unique; this Court has repeatedly acknowledged that the ability to enforce federal rights is not limited to governmental actors. In *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), the Court observed that "Congress has [often] opted to rely heavily on private enforcement to implement public policy." *Id.* at 263. The civil rights statutes, 42 U.S.C. §§ 1981, 1982, 1983, 1985, and 1986 also provide examples of statutes in which Congress has authorized private enforcement of federal rights. *Cf. Golden State Transit Corp.* v. *City of Los Angeles*, 493 U.S. 103, 109 (1989). *Id.* at 109 ("We agree with the petitioner that it is the intended beneficiary of a statutory scheme that prevents governmental interference with the collective-bargaining process and that the NLRA gives it rights enforceable against governmental interference in an action under § 1983"). Similarly, a private Section 107 action enforces CERCLA's liability provisions against responsible parties.

[8] *See* Office of Emergency & Remedial Response, U.S. Environmental Protection Agency, *Progress Toward Implementing SUPERFUND, Fiscal Year 1990* 15 (Feb. 1992).

B. Congress' Intent To Authorize Attorneys' Fees Awards Is Made Explicit In Section 101 Of CERCLA.

In determining whether CERCLA authorizes attorneys' fees in private cost-recovery actions, the starting point is, of course, the statute's language. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992); *Pennsylvania Dep't of Pub. Welfare* v. *Davenport*, 495 U.S. 552, 557-58 (1990). In the 1986 SARA Amendments, Congress expanded the definition of response costs that private parties may recover to read as follows: "the terms 'respond' or 'response' means remove, removal, remedy, and remedial action, all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25).[9] This definition of recoverable "response" costs necessarily and unambiguously encompasses attorneys' fees.

Courts—including the court below—have recognized that a natural reading of " 'costs' of 'enforcement activities' " includes attorneys' fees: "[a]ttorneys' fees are incurred in every private action to enforce rights embodied in a federal statute where the litigant is represented by counsel." *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Similarly, the Eighth Circuit has observed: "Attorney fees and expenses necessarily are incurred in this kind of enforcement activity and it wou'd strain the statutory language to the breaking point to read them out of the 'necessary costs' that section 9607(a)(4)(B) allows private parties to recover." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991).

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[9] Prior to 1986, the term "response" was defined as meaning "remove, removal, remedy, and remedial action." 42 U.S.C. § 9601(25) (1982). The SARA amendments added: "all such terms (including the terms 'removal' and 'remedial action') include enforcement activities related thereto." 42 U.S.C. § 9601(25) (1988).

This natural reading of "enforcement costs" is squarely supported by the terms' context. Enforcement of a party's liability obligations is a CERCLA "enforcement activity" as clearly as is enforcing a party's obligation to conduct a cleanup. Indeed, the only "enforcement activity" a private party may take under CERCLA Section 107 is enforcement—through a lawsuit—of another party's liability for response costs under that section.[10]

And because the primary cost to a private party of bringing a lawsuit is attorneys' fees, the right to recover the "costs" of "enforcement activities" would be largely meaningless unless it included the right to recover attorneys' fees.[11] It is axiomatic that a statute must be construed so as to give effect to *all* its terms. *Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 7 (U.S. Jan. 24, 1994) (" 'statute should be interpreted so as not to render one part inoperative' ") (quoting *Mountain States Tel. & Tel. Co.* v. *Pueblo of Santa Ana*, 472 U.S. 237, 249 (1985)); *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 369 n.14 (1986).[12]

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[10] As the Eighth Circuit recognized, a "private party cost-recovery action . . . is an enforcement activity within the meaning of the statute." *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991); *see also Stanton Road*, 984 F.2d at 1023 (" 'enforcement' of CERCLA by a private party consists in suing to hold the polluter liable") (Canby, J., dissenting).

[11] A party may incur other expenses in litigation, such as docket, witness, and transcription fees. Had Congress intended to enable private parties to recover litigation expenses *other* than attorneys' fees, Section 107(a)(4)(B) would be unnecessary. A party may recoup most such litigation expenses as statutorily defined "costs" under 28 U.S.C. § 1920.

[12] *See Stanton Road*, 984 F.2d at 1023 ("When Congress amended CERCLA to permit such private litigants, among others, to recover the 'costs' of 'enforcement activities,' it is difficult to imagine what it might have had in mind other than the recovery of attorneys' fees. . . . If the language of Congress in sections 107(a)(4)(B) and 101(25) is to be given meaning and effect, those fees must be recoverable") (Canby, J., dissenting).

Failure to permit parties that provide remediation to recover their full costs of enforcement creates perverse disincentives to cooperative cleanup of hazardous sites, a result wholly at odds with Congress' objectives in enacting CERCLA. If attorneys' fees are not recoverable as costs of "enforcement activities," then a recalcitrant PRP can threaten to prolong the litigation in a way that will reduce significantly the real ability of a party to recover its full response costs. Thus, the expense of attorneys' fees will become a bargaining chip by those PRPs less willing to carry their full share of responsibility for cleaning up a particular site. No reason exists to reward that kind of behavior. Moreover, it is fanciful to assume that the inability to recover full out-of-pocket costs will not affect every PRP's willingness to agree to incur significant cleanup expenses in the first place. Thus, the primary goal of ensuring prompt remediation of hazardous sites is directly harmed by the rule adopted by the court of appeals in this case. Accordingly, *amicus*' interpretation of Sections 101 and 107 is clearly preferable because it alone "produces a substantive effect that is compatible with the rest of the law." *United Sav. Ass'n* v. *Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988).[13]

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[13] The case decided by the Eighth Circuit, *General Electric Co.* v. *Litton Industrial Automation Systems, Inc.*, 920 F.2d 1415 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991), provides an excellent example of this problem. There, Litton was responsible for *all* of the hazardous wastes at the site in question. Nevertheless, it never cooperated in any aspect of the proposed and implemented remediation of that site. It then refused to negotiate a reasonable settlement of the actual costs, and postponed reimbursement of those costs for five years while pursuing through litigation *all the way to this Court* strikingly weak arguments on the merits of Litton's duty to remediate. General Electric's attorneys' fees in prosecuting that action through three levels of the federal judiciary were unquestionably significant. Had GE not recovered its out-of-pocket costs, including its outside legal fees, its actual recovery for volunteering to remedy the site would have been woefully inadequate.

It is thus clear beyond doubt that Congress provided in private Section 107 cost-recovery actions the explicit authorization to award attorneys' fees that this Court found missing in both *Alyeska* and *Runyon*. See *infra* pp. 16-19. Various arguments have been advanced in the lower courts to overcome this conclusion, but each is unavailing.

1. It has been argued, based on scant legislative history,[14] that Congress intended for only the government, and not private parties, to recover attorneys' fees. This argument is refuted by the language and structure of the statute itself.

In the SARA Amendments, Congress placed the "enforcement" language in Section 101, a general definitional section that applies to *all* parties—both governmental and private—acting under the remedial provision of Section 107. 42 U.S.C. § 9601(25). Had Congress intended to limit the recovery of attorneys' fees to the government, it would not have placed the "enforcement" language in a provision of general applicability. Rather, the logical

[14] The sole support for the argument that Congress intended the "enforcement" language to cover attorneys' fees, but only EPA's attorneys' fees, is *Part I* of a House Report: "The section also modifies the definition of 'response action' to include related enforcement activities. The change will confirm the EPA's authority to recover costs for enforcement actions taken against responsible parties." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. I, at 66-67 (1985), *reprinted in* 1986 U.S.C.C.A.N. 2835, 2848-49 (Report of House Committee on Energy and Commerce). However, *Part V* of this same report mentions the "enforcement" language without any limitation to EPA: "Subsection (d) amends the definition of what constitutes a response to include related enforcement activities, thereby permitting recovery of those costs." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. V, at 6 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3124, 3129 (Report of House Committee on Public Works and Transportation). Importantly, the *conference* report attached to the bill that ultimately was enacted into law does not even mention EPA. H. Conf. Rep. No. 962, 99th Cong., 1st Sess. 185 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3276, 3278.

course would have been to insert the "enforcement activities" language into the CERCLA cost-recovery section applicable only to the government, Section 107(a)(4)(A), or expressly qualify the language in Section 101(25) to make plain that the definition was limited to actions taken by the government. That Congress followed neither of these courses further confirms the natural reading of the statute: attorneys' fee awards are authorized in *all* cost-recovery actions, private and governmental alike.

2. The United States has previously made the related argument that the term "enforcement activities" does not describe cost-recovery actions, but only actions to compel a PRP to conduct a cleanup, which can be brought exclusively by the government under Sections 104 and 106. But once again, that argument cannot be squared with Congress' decision to place the "enforcement activities" language in a section applicable to *both* the government and private parties.

Furthermore, if accepted, this argument would lead to the conclusion that the United States may recover attorneys' fees only when it brings suit to enjoin parties to conduct cleanups. Yet the United States regularly seeks and obtains its attorneys' fees incurred in actions brought under Section 107 to recover costs for cleanups that it has conducted itself. See, *e.g.*, *United States* v. *Mottolo*, 695 F. Supp. 615, 631 (D.N.H. 1988) (relying on Section 101(25) to award EPA the attorneys' fees it incurred in bringing a Section 107(a) cost-recovery action); *United States* v. *Northernaire Plating Co.*, 685 F. Supp. 1410, 1412-13, 1417-18 (W.D. Mich. 1988) (United States conducted cleanup action and then brought Section 107 action to recover its costs, including attorneys' fees incurred in the cost-recovery action). Because private parties, like the government, bring cost-recovery actions under Section 107, that section provides *identical*

relief to both. Costs of "enforcement activities" can have only one meaning.[15]

3. Section 104(b)(1), entitled "Information; Studies and Investigations," authorizes the federal government to perform environmental studies and investigations (including legal investigations).[16] But the government has argued that by using the term "legal" in a section of CERCLA that pertains to the government, Congress manifested an intention that attorneys' fees not be recoverable in private cost-recovery actions.

This argument is nothing more than a *non sequitur* that disregards the plain language of Section 107. Section 107 on its own defines cost-recovery actions and creates the liability for "any other necessary costs of response."[17] Nothing in Section 104(b) serves to limit the rights Section 107 explicitly confers on *all* actors enforcing CERCLA.

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[15] It is a "basic canon of statutory construction that identical terms within an Act bear the same meaning." *Estate of Cowart* v. *Nicklos Drilling Co.*, 112 S. Ct. 2589, 2596 (1992). "Ascribing various meanings to a single iteration of [costs of enforcement activities]—reading the word differently for each [category of party] to which it applies—would open Pandora's jar." *Ratzlaf* v. *United States*, No. 92-1196, 62 U.S.L.W. 4037, 4039 (U.S. Jan. 11, 1994) (citation omitted). *Accord, Department of Revenue* v. *ACF Indus., Inc.*, No. 92-74, slip op. at 9 (U.S. Jan. 24, 1994).

[16] Section 104(b)(1) provides in part:

> the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

42 U.S.C. § 9604(b)(1).

[17] "Section 107 of CERCLA sets forth the provisions imposing liability for the cost of hazardous substance clean-ups under the Act." H.R. Rep. No. 253, 99th Cong., 1st Sess., pt. III, at 17 (1985), *reprinted in* 1986 U.S.C.C.A.N. 3038, 3040 (Report of House Committee on the Judiciary).

Further, the government misconstrues the function of Section 104(b)(1) in the CERCLA scheme. Section 104(b)(1) does not, as the government supposes, authorize it to recover its attorneys' fees in cost-recovery actions.[18] Rather, as its title indicates, this section serves only to provide authority for the federal government to conduct three distinct types of investigations and studies related to the cleanup goals of CERCLA, namely, studies (1) to plan and direct response actions, (2) to recover the costs of response actions, and (3) to enforce CERCLA.

But CERCLA provides the authority to conduct each of the activities to which the studies relate in *separate* sections.[19] Consequently, Section 104(b) can be construed to provide the actual authority for those activities, as opposed merely to authorizing studies and investigations, only by reading it to be redundant of other CERCLA provisions. This is plainly unwarranted.

4. Finally, awarding attorneys' fees here does not depend upon the type of "policy" analysis forbidden by *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). *Alyeska* prohibits an award of attorneys' fees based solely on "the courts' assessment of the importance of the public policies involved in particular cases." *Id.* at 269. Here, by contrast, a clear statutory basis exists for making such an award: as shown

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[18] Even if one accepts the notion that Section 104 authorizes an award of attorneys' fees to the government, private parties are nonetheless entitled to awards of attorneys' fees incurred in bringing cost-recovery actions under Section 107, as petitioner has convincingly demonstrated.

[19] The authority to plan and direct response actions is found in Section 104(a) (42 U.S.C. § 9604(a)) and Section 121 (42 U.S.C. § 9621); the authority to recover costs is found in Section 107(a)(4)(B) (42 U.S.C. § 9607(a)(4)(B)); and the authority to enforce CERCLA is found in a variety of sections, including, among others, Sections 104(a) (42 U.S.C. § 9604(a)), 106(a) (42 U.S.C. § 9606(a)), and 107(a) (42 U.S.C. § 9607(a)).

above, the text of CERCLA explicitly authorizes private parties to recover their "response costs," including all "costs" of "enforcement activities."

It is unsurprising that the policy concerns that motivated Congress in enacting and later strengthening CERCLA are also served by a recognition that private parties may recover attorneys' fees under Section 107. As fee awards will promote CERCLA's fundamental goal of encouraging private remediation of hazardous waste contamination, this application of Sections 107 and 101(25) appropriately gives effect to the plain language of the statute *and* harmonizes CERCLA's specific provisions with its general underlying goals. This Court has counseled that "[i]n determining the meaning of the statute, we look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon* v. *United States*, 494 U.S. 152, 158 (1990); see also *Department of Revenue* v. *ACF Indus., Inc.*, *supra*, slip op. at 9-10.

In sum, private parties invoke Section 107 in precisely the same way the United States does when it seeks to collect CERCLA response costs. Given that private parties have the right to bring cost-recovery actions under CERCLA, that both the government and private parties look to the same provision for recovery of response costs, and that the definition of "response" is the same for all parties pursuing an action under Section 107, CERCLA provides clear authority for recovery of attorneys' fees.

C. Congress' Intent In CERCLA To Permit Private Parties To Recover Their Attorneys' Fees Is Clear, And No Particular "Magic Words" Are Required.

Contrary to the decisions of the Sixth and the Eighth Circuits,[20] the court of appeals concluded—with one judge

[20] *General Elec. Co.* v. *Litton Indus. Automation Sys., Inc.*, 920 F.2d 1415, 1422 (8th Cir. 1990), *cert. denied*, 499 U.S. 937 (1991);

dissenting—that CERCLA does not authorize private parties to recover attorneys' fees as a cost of "enforcement" in cost-recovery actions. *Stanton Road Assoc.* v. *Lohrey Enters.*, 984 F.2d 1015, 1020 (9th Cir.), *cert. dismissed*, 114 S. Ct. 652 (Dec. 16, 1993). Relying on *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975), and *Runyon* v. *McCrary*, 427 U.S. 160 (1976), the court concluded that "the words 'necessary costs of response' do not expressly authorize an award of attorneys' fees for legal expenses incurred in remediating the contamination of property." *Stanton Road*, 984 F.2d at 1019. That reliance was misplaced; the majority erred in reading *Alyeska* and *Runyon* as establishing a wooden rule that attorneys' fees may be awarded only if the underlying statute *expressly* contains the terms "attorneys' fees" or "legal costs," regardless of Congress' actual intent expressed in the statute. *Stanton Road*, 984 F.2d at 1019.

Alyeska held that, under the American Rule, attorneys' fees may not be awarded under a private attorney general theory merely because a litigant has vindicated an important public interest. To the contrary, the Court explained, attorneys' fees generally are to be awarded only when Congress has adopted an "explicit provision" for such an award. 421 U.S. at 260.

Nothing in *Alyeska* bars an attorneys' fees award to a private party in a CERCLA case. Unlike the present case, the prevailing party in *Alyeska* did not rely on *any* statute as the basis for a fees award. By contrast, CERCLA *explicitly* authorizes private parties not only to act as "private attorneys general," but also to recover all "necessary costs" of doing so.

This case is also very different from *Runyon*. There, the petitioner claimed that 42 U.S.C. § 1988 "implicitly"

accord, *Donahey* v. *Bogle*, 987 F.2d 1250, 1256 (6th Cir.), *cert. denied*, 114 S. Ct. 636 (1993).

authorized an award of attorneys' fees to a successful litigant bringing a case under 42 U.S.C. § 1981, part of the Civil Rights Act of 1866. 427 U.S. at 184. The petitioner argued that Section 1988's broad remedial purpose, which "authorize[s] federal courts, where federal law is unsuited or insufficient 'to furnish suitable remedies,' to look to principles of the common law, as altered by state law,"[21] *id.* at 185 (quoting *Moor* v. *County of Alameda*, 411 U.S. 693, 702-03 (1973)), required such an award. This Court rejected the argument that such "generalized commands," 427 U.S. at 186, constituted an "explicit congressional authorization . . . [of] attorneys' fees." *Id.* at 185.

No such "generalized commands" are at issue here. Instead, Congress chose to use language in CERCLA—authorizing recovery of "necessary costs of response," 42 U.S.C. § 9607(a)(4)(B), and defining "response" to include "enforcement activities," *id.* § 9601(25)—that makes clear Congress' intent to permit the recovery of attorneys' fees.[22]

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[21] The section then provided:

> The jurisdiction in civil . . . matters conferred on the district courts by the provisions of this chapter and Title 18, for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of . . . [the] cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause . . . .

42 U.S.C. § 1988, *quoted in Runyon* v. *McCrary*, 427 U.S. 160, 184 (1976).

[22] Moreover, the majority of the court of appeals ignored entirely this Court's reasoning in *Runyon*. The *Runyon* Court did not begin

The court below not only failed to observe the crucial contrast between the statute involved in *Runyon* and the language of CERCLA, but also distorted *Runyon*'s requirement of an "explicit" statutory authorization for an award of attorneys' fees. The majority erroneously converted the "explicit" requirement into a rule that Congress must use certain "magic words." Elevating form over substance, the court concluded in effect that attorneys' fees may be awarded only if a statute "expressly" mentions that term or an exact synonym, even if, employing conventional statutory construction, the statute "explicitly" or "clearly" reflects Congress' intention to allow fees awards. *Stanton Road*, 984 F.2d at 1019.

That the correct approach is to ascertain Congress' explicit intent rather than search for "magic words" is confirmed by *both* cases in which this Court has previously considered analogous problems under CERCLA. In *Pennsylvania* v. *Union Gas Co.*, 491 U.S. 1 (1989), this Court held that CERCLA abrogated the States' Eleventh Amendment immunity from suits for monetary damages. *Id.* at 10. Beginning with the well established constitutional tenet that Congress may override the States' Eleventh Amendment immunity only when it makes "its intent

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and end its inquiry by searching the statute in question for the words "attorneys' fees." Had it taken that appoach, its opinion would have been very brief, for the Civil Rights Act of 1866 indisputably contained no such term. Instead, the *Runyon* Court construed the 1866 Act employing traditional tools to determine Congress' actual intent concerning attorneys' fees. 427 U.S. at 184-86. After examining the statutory text, the Court examined prior case law and the legislative history, and concluded that "nothing in the legislative history of that statute suggests that such a radical departure from the long-established American rule forbidding the award of attorneys' fees was intended." *Id.* at 184-85. The *Runyon* Court thus looked to the statutory language first, and confirmed its conclusion by reference to the context and purpose of the statute as a whole; the Court pointedly did *not* require the issue to be approached by Congress using any particular formulation. In this case, such an analysis results in the conclusion that CERCLA *does* authorize the recovery of attorneys' fees by private parties, as discussed above.

to do so 'unmistakably clear,'" this Court examined CERCLA as a whole and concluded that it displayed the requisite clarity of intent, even though the statute never mentioned the Eleventh Amendment. *Union Gas* decisively rejected the argument that Congress could abrogate the Eleventh Amendment only by using statutory language similar to language it had previously employed, stating: "If no magic words are required for abrogation, then each statute must be evaluated on its own terms, not defeated by reference to another statute that uses more specific language." *Id.* at 13 n.4. Likewise, in *Exxon Corp.* v. *Hunt*, 475 U.S. 355, 363 (1986), this Court held that portions of CERCLA "express[ly]" preempted state law even though the critical statutory language was "inartful" and "not a model of legislative draftsmanship."

* * * *

CERCLA's plain language authorizes an award of attorneys' fees in private cost-recovery actions. No other construction of CERCLA makes either linguistic or rational sense. In Section 107, Congress permitted *private parties* to recover "response costs." In Section 101, Congress defined that term to include the "costs" of "enforcement activities." Because a private cost-recovery action is an "enforcement activity," and because the major cost incurred in that enforcement activity is attorneys' fees, Sections 101 and 107 of CERCLA can only be read to permit a private party to recover its attorneys' fees expended in a cost-recovery action. The court below erred, both as a matter of logic and as a matter of statutory interpretation, in insisting that Congress can authorize attorneys' fees awards only through the use of "magic words."

The provisions of CERCLA thus decidedly fulfill the requirements for an exception to the American Rule. But it should be recognized that a party's pursuit of its attorneys' fees in a Section 107 action does *not* fit the usual circumstances under which the American Rule generally

applies. The United States' legal system, in contrast to others, considers the party to have been "made whole" upon recovery of damages, *without* recovering attorneys' fees. See generally *Alyeska*, 421 U.S. at 261. Typically, therefore, a prevailing party seeks to recover its attorneys' fees as part of its expenses; the fees award is thus an adjunct to the damages the party has already recovered, not a part of the underlying claim on the merits. This typical situation is altered for the CERCLA plaintiff in a cost-recovery action: The language and structure of CERCLA make clear that "costs" of "enforcement activities"—which must necessarily encompass attorneys' fees—themselves constitute *part of the party's damages.*

Accordingly, it should come as no surprise that Congress did not express its intention to allow attorneys' fees to be recovered by private parties by using the classic terms traditionally employed in other federal statutes to shift attorneys' fees from a plaintiff to a defendant. The unique nature of claims under Section 107 explains the equally unique formulation Congress employed to confer an express right to attorneys' fees as part of private enforcement actions. What dictates the proper outcome of the case is that the language in Sections 101 and 107 is sufficiently plain to provide an exception to the American Rule even for a typical federal statute; it follows *a fortiori* that the language is sufficient to entitle a private party to recover attorneys' fees in the relatively unusual circumstances created by CERCLA.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the court of appeals, and hold that private parties may recover attorneys' fees under CERCLA.

Respectfully submitted,

JESS WOMACK
ATLANTIC RICHFIELD COMPANY
515 South Flower Street
Los Angeles, CA 90071
(213) 486-8780

REX E. LEE
CARTER G. PHILLIPS *
JANET M. LETSON
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

LARRY G. GUTTERRIDGE
JAMES M. HARRIS
LAURINE E. TULEJA
555 West Fifth Street
Los Angeles, CA 90013

Counsel for Atlantic Richfield Company

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* Counsel of Record